

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





76-1249

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Prof S

UNITED STATES OF AMERICA,  
Appellee,  
vs.  
BRUCE WHEATON,  
Appellant.

APPELLANT'S OPENING BRIEF *and appendix*

Attorney for Appellant

Attorney for Appellant

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STATEMENT OF THE CASE

On March 25, 1976, a five count indictment was filed charging defendant with violations of the Federal Narcotics Laws. An Identity Hearing was held on April 15, 1976, before the Honorable John R. Kroneuberg, Federal District Judge for the Central District of California. The defendant was ordered to appear in the United States District Court, Southern District of New York for trial. The defendant appeared April 19, 1976, and was advised a not guilty plea had been entered on his behalf. The case was called for trial and a jury trial ensued before the Honorable Lloyd F. MacMahon, Federal District Judge. On May 11, 1976, the defendant was found guilty on counts one, four and five.

On May 24, 1976, sentence was imposed at fifteen years imprisonment and three years special parole to run concurrently on each count. A timely Notice of Appeal was filed and the case is now before this Court.

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3                   STATEMENT OF FACTS

4           The initial and primary witness for the Government was a Thai  
5 national, BOONSAK PHUVASITKUL, a conspirator who turned state's  
6 evidence. He testified [R.T. 11] that he met MANOP SAIPHANTONG in  
7 September of 1975. Over defense counsel Solomon's objection  
8 Boonsak was permitted to testify about a conversation with Manop  
9 regarding the importation of heroin from Bangkok, Thailand, to New  
10 York. BOONTERM PETKAMNERD's name was mentioned as the supplier of  
11 the heroin [R.T. 12]. Boonsak testified, over Mr. Solomon's  
12 standing objection regarding "connecting up," to a subsequent  
13 conversation with Manop in which Manop said he could have the  
14 heroin mailed out to the United States by colored guys working at  
15 a United States Air Base [R.T. 14].

16           Boonsak then testified to another meeting in December 1975  
17 in a coffee shop in Thailand, attended by himself, Boonterm, Manop  
18 and one PERM PETKAMNERD [R.T. 15]. The conversation consisted of  
19 plans to mail 700 grams of heroin into the United States and that  
20 it had to be done before the early part of 1976 because the guy at  
21 the Air Base had to quit his job [R.T. 16].

22           Boonsak then testified that he had another meeting with Manop  
23 the end of December or early January of 1976 and that Manop said,  
24 "I never seen Mr. Boonterm for a long time." [R.T. 17]. Manop  
25 reportedly said that Boonterm was at Rayong and that Boonterm had  
26 a friend there by the name of Bruce who was "dealing the business  
27 together" [R.T. 18], and that:

28           "Bruce have a friend, the name of Don, who working in the air



1 base, can mail the heroin." Boonsak said that Manop said that  
2 Boonterm had known Bruce since 1973 or 1974, and that they were  
3 dealing in heroin before. The judge instructed the jury to  
4 disregard prior dealings. [R.T. 19]

5 Boonsak said he made two phone calls in January of 1976 to a  
6 Mr. Jack in New York. [RT. 22]

7 Boonsak then testified that on the 4th of February 1976 he,  
8 Boonterm, Perm, and Manop went to Don's apartment where Don demon-  
9 strated how to pack heroin for mailing so as to avoid detection by  
10 dogs [R.T. 26]. Boonsak also said he had this conversation with  
11 Boonterm [R.T. 27]:

12 A. After I finish talk to Don, Mr. Boonterm told me  
13 and he give me a piece of paper. He say, "When you  
14 went to New York, you going to see Mr. Bruce Wheaton by  
15 this address and show him my ID cards and say I come  
16 from Boonterm."

17 And Mr. Boonterm also told me that, "When you see  
18 Bruce, tell him send to the money to him."  
19 About that time I only did know but I couldn't  
20 remember, Boonterm told me say Mr. Bruce owe Mr. Boonterm  
21 money, about \$20,000.

22 The piece of paper was introduced into evidence and received  
23 subject to connection [R.T. 28].

24 Further testimony was given by Boonsak regarding the con-  
25 spirators' plans and telephone calls by Boonsak to Mr. Jack in New  
26 York [R.T. 28-34]. The appellant's name was never mentioned in  
27 these plans.

28 Boonsak testified he had a telephone conversation with Manop



1 on February 16, 1976 in which Manop said he had mailed heroin to  
2 New York pursuant to Don's instructions [R.T. 36]. He said he  
3 received a cable from Mr. Coleman instructing him to pick up an  
4 airplane ticket sent by the "people of New York" [R.T. 39], and that  
5 he discussed it with Manop. Boonsak said that Manop said that  
6 Bruce Wheaton was then in Bangkok staying at the Chevalit Hotel,  
7 that Bruce went to see Mr. Boonterm. Boonsak admitted he had no  
8 first hand knowledge if "Mr. Bruce see Mr. Boonterm or not"  
9 [R.T. 42].

10 Boonsak testified that Manop said that the appellant came to  
11 buy the "merchandise" from Boonterm, three units, and that Bruce  
12 would give it to Don for mailing [R.T. 43].

13 He then said that he changed airline tickets, received 500  
14 U.S. dollars from Andy Fenrich and left Thailand on his way to the  
15 United States on March 6, 1976. En route he stopped in Frankfurt  
16 where he called Manop. Manop told him that Bruce Wheaton left  
17 Bangkok the same day as Boonsak. Manop told him that Bruce had  
18 given three units of heroin to Don to mail to the United States.  
19 A receipt showing the charges for the phone call was introduced.  
20 [R.T. 47]. Boonsak left Frankfurt and flew to Toronto.

21 There he met "Mr. Jack and Mr. Andy," who told him the mer-  
22 chandise he mailed to them was good. [R.T. 48]. He asked for his  
23 money and showed them the paper with Bruce Wheaton's name and  
24 address and stated:

25 This guy just left Bangkok and went to buy the heroin  
26 from Mr. Boonterm and now they give to the guy who work  
27 in the air base to mail. The merchandise on the way  
28 now. [R.T. 49]

1 The next day Boonsak flew to New York. The ticket purchased by  
2 Jack and Andy was introduced. Jack and Andy took him to a bar in  
3 Manhattan where they met Mr. John Coleman [R.T. 52]. He showed  
4 them the piece of paper on which Boonterm had written Bruce  
5 Wheaton's name and address and told them:

6 Mr. Bruce, he went to buy the heroin in Bangkok  
7 from Mr. Boonterm. Now the heroin they already give to  
8 Mr. Don to mail the heroin. The heroin is on the way now.

9 Boonsak was then arrested by Jack, Andy and Mr. Coleman. The  
10 date was March 8th or 9th, 1976. After his arrest, he made tele-  
11 phone calls to Manop and Don from the Government offices, at the  
12 direction of government agents. On March 23, 1976 he placed  
13 another call, this one to Bruce Wheaton and it was recorded.  
14 [R.T. 55].

15 Boonsak was asked the following:

16 Q Now, did you ever meet Bruce Wheaton?

17 A No, sir.

18 Q Do you know this man (indicating)?

19 A I never see him, sir.

20 MR. SOLOMON: I didn't get that.

21 MR. VIRELLA: May the record reflect I was behind  
22 Mr. Wheaton?

23 THE COURT: Yes.

24 MR. SOLOMON: What was his answer?

25 MR. VIRELLA: He never met him, never saw him. [R.T. 55]  
26 All of the recordings referred to and transcriptions were received  
27 into evidence over objection of Mr. Solomon, subject to connection.

28 Boonsak set forth the details of trading his testimony for

1 dismissal of several counts against him. Then the transcriptions  
2 were read to the jury. Mr. Solomon withdrew his objection to  
3 People's 67 and the conversation between Boonsak and appellant was  
4 played to the jury.

5 On cross examination by Mr. Solomon, Boonsak admitted that  
6 Bruce Wheaton did not call back as Boonsak requested. He said he  
7 made the call to Bruce from a government office, and that there was  
8 a conversation with Mr. Taylor shortly before the call was made.  
9 [R.T. 70].

10 The next witness called by the Government was Jack Taylor, a  
11 special agent for the Drug Enforcement Administration. He said  
12 that he had numerous phone conversations with Boonsak regarding the  
13 purchase of heroin. The conversations were recorded [R.T. 73].  
14 He testified he met with Boonsak in Toronto on March 7, 1976 with  
15 Agent Fenrich, who was posing as his attorney.

16 He related the conversation between himself and Boonsak:  
17 that the heroin he received was good quality; that Boonsak wanted  
18 \$35,000; and that Boonsak would have to go to New York to pick up  
19 the money, which Boonsak agreed to do.

20 Taylor said that Boonsak said that he had the name and address  
21 of an individual, "given to him by a man in Thailand," and  
22 that this individual had two units of heroin. Boonsak showed him  
23 the paper with Wheaton's name and address and said Taylor could  
24 probably get the heroin from Wheaton [R.T. 75].

25 Taylor also said that Boonsak said:  
26 that the man who gave him this, a man named Boonterm, told  
27 him to go and contact this man Wheaton to tell Wheaton that  
28 Boonterm wanted the \$20,000 that Wheaton owed to Boonterm.



1 And he was to instruct Wheaton to mail the \$20,000 to  
2 Boonterm as soon as possible.

3 He stated the main reason he had Wheaton's name and  
4 address was to go and try and collect a debt owed to  
5 Boonterm. [R.T. 76-77]

6 He said that he had already received a package of heroin  
7 and that Boonsak was in New York to pick up the \$35,000 owed for  
8 it. He stated that the package was mailed to an address in New  
9 York City supplied by Taylor to Boonsak previously.

10 Taylor testified that when Boonsak flew from Toronto to  
11 New York City, he and agent Andy Fenrich picked him up and took  
12 him to a hotel where they met with agent John Coleman. A con-  
13 versation took place as follows:

14 A Again Phuvastikul stated to Coleman in my presence  
15 that Wheaton would be the man to contact in order to  
16 get heroin immediately, that he was given the address  
17 by Boonterm to go and collect the \$20,000, and that  
18 he was in a rush, that he wanted to be paid his money  
19 as soon as possible so he could leave immediately  
20 for Bangkok in order to ship more heroin and again  
21 meet the replacement for the man named Don at the  
22 Air Force post office. [R.T. 79]

23 He also said Boonsak showed the agents Boonterm's Thai national  
24 identity card.

25 He testified that the phone calls by Boonsak to Manop and  
26 Don were made in his presence and in his office. He said a  
27 search warrant was obtained and under the search warrant a  
28 letter was seized from the post office [R.T. 82]. The letter

1 and envelope were received into evidence over the objection of  
2 Mr. Solomon [R.T. 83]. The letter was read to the jury.

3 Then Agent Taylor testified that he was present when Boonsak.  
4 called Bruce Wheaton, and that the call was recorded.

5 On cross examination Mr. Taylor admitted that he instructed  
6 Boonsak as to how he was to conduct the conversation with Bruce  
7 Wheaton and that Boonsak followed his instructions [R.T. 87].

8 John Coleman was the next witness called by the Government.  
9 He said he was a government agent and was present in February and  
10 March 1976 when Boonsak made the telephone calls, and that the  
11 recordings introduced were accurate. He said he was present when  
12 Boonsak was arrested.

13 Andrew Fenrich was the next government witness. He is a  
14 Special Agent with the Drug Enforcement Administration [R.T. 91].  
15 He said he was one of the agents who, on February 23, 1976, picked  
16 up a package from the undercover mailbox for the Drug Enforcement  
17 Administration in New York City. He said he took the package to  
18 Mr. Edward Manning, a Drug Enforcement Administration chemist.  
19 They opened the package, tested the contents and it proved posi-  
20 tive for narcotic substance. The narcotic was introduced and  
21 Mr. Solomon objected "on the ground this defendant had no con-  
22 nection of any kind with this exhibit, 1A." [R.T. 93] The Court  
23 admitted exhibit 1A subject to connection. The Government then  
24 introduced exhibit 1C, a towel which had been wrapped around  
25 the narcotic. Mr. Solomon objected on the grounds that this  
26 defendant was not connected with the narcotic at all. The  
27 objection was overruled and the evidence received [R.T. 94].  
28 Mr. Fenrich then testified that he was at the meeting with



1 Boonsak in Toronto. He said that when Boonsak was asked if  
2 Fenrich and Taylor could get more heroin, Boonsak

3 then produced a piece of white lined paper which had the  
4 name and address of Bruce E. Wheaton, a Bronx address in  
5 New York. He then stated that Mr. Wheaton had two units  
6 and that Mr. Wheaton owed an individual by the name of  
7 Boonterm Petkamnerd a certain sum of money, and that he  
8 was told by this individual to go to that address in the  
9 Bronx and receive the money from Mr. Wheaton. [R.T. 95]

10 Matthew Maher was the next witness called by the Government.  
11 He was a special agent with the Drug Enforcement Administration  
12 in Bangkok. He testified that he was present when defendant  
13 Head was arrested and that he seized a parcel containing  
14 \$26,800 in United States currency from Mr. Head [R.T. 103].  
15 Mr. Solomon objected to the introduction of the parcel and  
16 money on the grounds that the parcel was illegally seized. The  
17 court overruled the objection and admitted the evidence.

18 Jamroon Sawanabrooma, an investigative assistant of the  
19 Drug Enforcement Administration was the next witness for the  
20 Government. He testified to tape recording a conversation with  
21 Don Head and receiving a slip of paper from Head. He was asked  
22 what "1/2 harp tur" was and he replied: [R.T.107]

23 It mean a unit. This is the short word used by the  
24 narcotic trafficker. It is a unit which is weighed  
25 at 700 gram. In half it mean it is 350 gram of heroin.

26 The tape recording and transcript thereof was introduced  
27 and received subject to connection, over Mr. Solomon's objection  
28 that there was not at any proof of a conspiracy [R.T. 108].

1 Ivan Jones, the supervisor of Don Head at the air base, was  
2 the last witness for the Government. He testified to Mr. Head's  
3 duties in January and February 1976 [R.T. 109]. He said Don  
4 Head had access to the containers used to ship packages to the  
5 United States [R.T. 112].

6 A stipulation was entered into and received into evidence,  
7 and is reproduced in the Appendix hereto. The evidentiary phase  
8 of the case was closed.







1 to warrant submission of a conspiracy charge to the jury."

2 The test in the Second Circuit, as stated in UNITED STATES  
3 vs GEANEY, 417 F2d 1116, 1120 (1969) is: has the prosecution  
4 proved participation in the conspiracy by the  
5 defendant against whom the hearsay is offered,  
6 by a fair preponderance of the evidence inde-  
7 pendent of the hearsay utterances. If it has,  
8 the utterances go to the jury for them to con-  
9 sider along with all the other evidence in  
10 determining whether they are convinced of  
11 defendant's guilt beyond a reasonable doubt.  
12 If it has not, the judge must instruct the jury  
13 to disregard hearsay, or, when this was so large  
14 a proportion of the proof as to render a caution-  
15 ary instruction of doubtful utility . . . , de-  
16 clare a mistrial if the defendant asks for it.

17 As is obvious from the continuing objection interjected by  
18 Mr. Solomon that he objected unless connection was established,  
19 and from the judge's reception of evidence subject to connection,  
20 the order of proof is subject to the discretion of the trial judge.  
21 In other words, the prosecutor may introduce the hearsay, subject  
22 to proving the defendant's complicity by independent evidence  
23 later in the Government's case. This is exactly what happened in  
24 the case at bar, with one exception. That exception is that the  
25 Government failed to introduce sufficient independent proof to  
26 warrant submission of the hearsay to the jury.

27 The vast majority of the Government's case consists only of  
28 the hearsay statements of the co-conspirator Boonsak. Virtually

1 all of Boonsak's statements which implicate the defendant are  
2 not made upon first-hand knowledge, but rather upon what Manop  
3 said or Boonterm said. For instance, there is testimony which  
4 placed the defendant in Bangkok at a meeting with Boonterm  
5 arranged to purchase heroin. However, Boonsak only said Wheaton  
6 was at such a meeting because Manop had already told him so. That  
7 testimony is tertiary hearsay, the most unreliable of evidence.  
8 Even if the testimony is admissible it proves nothing, for  
9 association with conspirators does not make one a conspirator.

10 UNITED STATES vs RAGLAND, supra.

11 The same is true of Boonsak's uncorroborated hearsay state-  
12 ments that Wheaton (1) mailed two or three units of heroin back  
13 to the United States through Don Head; (2) left Bangkok the same  
14 day as Boonsak; (3) had heroin which agents Jack and Andy could  
15 quickly purchase; and (4) had dealt in heroin in conjunction with  
16 Boonterm in the past. (A cautionary instruction was given on  
17 this point, but as any able trial attorney knows, it probably had  
18 little or no effect upon the jury.) All of this testimony was not  
19 known to be fact by Boonsak. He merely repeated what Manop told  
20 him. Yet Manop was not available for cross-examination.

21 In addition the Government presented a letter from Boonterm  
22 to the appellant which "consigned" to him 1/2 harp tur, or 350  
23 grams of heroin. This, too, is hearsay since it was an out-of-  
24 court statement offered to prove that Wheaton actually was consign-  
25 ed some heroin in accordance with a prior plan. It must be remem-  
26 bered that at no time did Wheaton receive this letter so as to know  
27 he was part of the conspiracy. There was also Boonsak's hearsay  
28 statement that Wheaton owed Boonterm \$20,000. The inference was



1 that the debt was owed for a prior shipment of heroin. Indeed,  
2 the prosecutor so argued, however improperly. There was no testi-  
3 mony to that fact. Once again this is multiple hearsay, based  
4 upon Boonterm's assertion to Boonsak. But, like Manop, Boonterm  
5 was not available for cross-examination. The note containing  
6 Bruce Wheaton's name, address and telephone number is of the same  
7 hearsay character. It is a statement written by Boonterm out of  
8 court offered to prove Wheaton was a knowing member of the conspir-  
9 acy. It is dangerous evidence because it is extremely difficult  
10 to refute without cross-examination of the writer. But Boonterm  
11 was unavailable.

12 Finally there is the testimony by Jack, Andy and Coleman that  
13 Boonsak told them that the defendant was in possession of two or  
14 three units of heroin that they could purchase quickly and that the  
15 heroin was shipped into the United States by way of Don Head. This,  
16 of course, is even worse evidence than any of the prior testimony.  
17 It constitutes fourth-hand hearsay: the agents said that Boonsak  
18 said that Boonterm and Manop said.

19 The evidence mentioned thus far constitutes approximately  
20 ninety percent of the evidence linking the appellant to the con-  
21 spiracy. It is all hearsay. The dangers of convicting a man on  
22 such evidence are obvious. It is unreliable. When a message is  
23 bandied about the third or fourth time there is an enormous proba-  
24 bility it will become confused. It is untrustworthy. All the tes-  
25 timony came from Boonsak - the man who traded his testimony in  
26 order to have several counts against him dismissed. It stands to  
27 reason that he implicated an innocent person, whose name he happen-  
28 ed to carry, in order to save himself. Finally, and perhaps most

1 importantly, the testimony is dangerous because the defendant had  
2 no opportunity to cross-examine the persons making charges against  
3 him. Manop and Boonterm were not in court. In the American sys-  
4 tem of justice it is only through effective cross-examination that  
5 the truth may be revealed. Thus the Sixth Amendment of the United  
6 States Constitution guarantees the right to cross-examination,  
7 which was effectively denied the defendant.

8 When the previously discussed testimony, all of which was  
9 received subject to connection, is not considered, as it must not  
10 be, the only remaining evidence linking the appellant to the  
11 alleged conspiracy is the March 23, 1976 telephone call from the  
12 Drug Enforcement Administration and Boonsak to the defendant. It  
13 is the only independent evidence which even arguably ties Mr.  
14 Wheaton to a conspiracy. The question which must be answered is  
15 "Does the telephone conversation alone prove participation by the  
16 appellant in the conspiracy by a fair preponderance of the evi-  
17 dence?" When viewed realistically with a view toward what was  
18 actually admitted and agreed to by the defendant, the answer must  
19 be that it does not.

20 The telephone conversation was engineered by the DEA agents.  
21 They admitted that they told Boonsak what to say and that he merely  
22 followed instructions. He was only a mouthpiece. Boonsak's words  
23 are the words that make it appear that the defendant was a conspira-  
24 tor. The defendant only listened and gave ambiguous responses.  
25 Boonsak said: "Yes, uh - I got the, the merchandise, two units, you  
26 know, they send it from Bangkok. Boonterm send it to me, but I  
27 cannot entrust the customer here because I deal this bus, business  
28 with him before, but this time they try to cheating me; I have two



1 units in here. I try you to help me. Don, do you know Don, right?"

2 Boonsak had to tell the defendant that there were two units  
3 in from Bangkok. Then he had to ask for help. If the appellant  
4 was a co-conspirator, he already would have known how much heroin  
5 had been imported. Boonsak could have counted on Wheaton's help  
6 automatically. There would have been no need to ask, "I try you  
7 to help me." And why the pronoun "me" - why not "us" if Wheaton  
8 was a conspirator? Wheaton replies that, "Um hum," he does know  
9 Don. Boonsak again asks, "Can you help me that?" Again the appel-  
10 lant does not indicate any assent. He says, "I don't know."

11 Later in the conversation the defendant indicates he does not  
12 know the caller. "What's your name? Boonsak, ah?" Boonsak had  
13 to describe himself. The defendant replied, "Um hum."

14 Again Boonsak asks Wheaton to come to New York City to help.  
15 Wheaton replies, "I told you, right now I don't know." There is no  
16 indication that Wheaton knew of the unlawful object of the conspir-  
17 acy or that he assented to assist in completion of the unlawful pur-  
18 pose. In fact he asked Boonsak what he did. "What time, what time  
19 do you work from? What time do you get off from work? Do you go  
20 to school? What you do?"

21 Boonsak had to explain that he was only here for "business"  
22 and that he didn't "know how to do this two units."

23 Wheaton replies, "Um, okay, uh . . ." That is the reply of a  
24 man who has no idea who is calling him or why. He was confused.  
25 All the defendant knew was that this was a friend of his friend  
26 Boonterm.

27 Boonsak asked Bruce to call him back later. Bruce agreed.  
28 However, it is uncontroverted that the defendant never called back.

1       The responses Wheaton gives are ambiguous at best. "Um",  
2 "Um hum" and "Hum", are sounds which often mean continue, or I hear  
3 you or tell me more, or I understand, or many other things. In the  
4 context of a mysterious phone call from an unknown man, it is un-  
5 reasonable to conclude that Mr. Wheaton agreed to do the things  
6 Boonsak suggested or was connected with the conspiracy.

7       When Boonsak suggested "if you can help me you take this two  
8 units then after you selling you send the money to the Boonterm  
9 directly, okay" Wheaton said "Um hum". It must be noted that the  
10 question begins with the hypothetical "if". Wheaton gives a hypo-  
11 thetical answer to a hypothetical question. Even Boonsak did not  
12 consider this an agreement to sell the two units for he was still  
13 trying to talk Bruce into helping. "Do you have any idea I can  
14 bring the money out of this country?" Wheaton said, "No, unless  
15 you could send it to him." It is manifest that the appellant did  
16 not agree to sell the units and send the money directly to Boonterm  
17 because he is still hypothetically suggesting that Boonsak send  
18 the money. Finally, when Boonsak asks how much he can sell the  
19 units for Bruce replies he doesn't know and indicates he does not  
20 want to discuss the matter further.

21       The phone call constitutes the only independent evidence pro-  
22 duced by the Government in its case against the defendant. Whe-  
23 ther taken as a whole or examined statement by statement, the tele-  
24 phone conversation fails to link the appellant to the unlawful  
25 agreement. The case is like UNITED STATES vs RENDA, 56 F2d 601  
26 (1932) in which the only even arguably independent evidence against  
27 an alleged conspirator was a telephone call to the defendant by a  
28 co-conspirator requesting "ten pieces" of morphine. Since there



1 was a total failure of other independent evidence to establish  
2 concerted action by the defendant, the court reversed the convic-  
3 tion of the defendant.

4 The Government failed, as in RENDA, supra, to produce a  
5 scintilla of independent evidence linking the defendant to any con-  
6 spiracy. It did not come close to producing a fair preponderance  
7 of evidence. Therefore, when the court denied Mr. Solomon's motion  
8 to strike out all of the testimony given by Boonsak on the grounds  
9 that it was all hearsay without any corroboration or independent  
10 confirmation, error was committed. It was the duty of the court  
11 to either declare a mistrial or issue a cautionary instruction  
12 unless such an instruction would be of doubtful utility. UNITED  
13 STATES vs GEANEY, supra, p 1120.

14 This is most emphatically a case in which an instruction was  
15 of no utility. As the court said in UNITED STATES vs GEANEY,  
16 supra, p 1120, "

17 It is difficult, of course, for the trial judge  
18 or a reviewing court to perform the intellectual  
19 feat of assessing the independent evidence free  
20 from the color shed upon it by the hearsay.

21 The case against the defendant was overwhelmingly and nearly  
22 entirely hearsay. If it is difficult for a learned judge to ignore  
23 the hearsay and look only at the independent evidence, it is impos-  
24 sible for an untrained jury. The instruction issued in this case  
25 [R.T. 166] was worthless in that regard.

26 Furthermore, the instruction is misleading. "You may not  
27 rely upon statements of one defendant to find that another defend-  
28 ant was a member of a conspiracy." [R.T. 166, lines 20-22] (Empha-

1 sis added). There was only one defendant, Mr. Wheaton. This  
2 instruction, therefore, indicates that Boonsak's hearsay testimony  
3 is competent to prove Wheaton's complicity. The appellant submits  
4 the instruction is misleading and a misstatement of the law.

5 Since the cautionary instruction was incorrect and since  
6 any instruction was of doubtful utility in this case, the court  
7 should have granted a mistrial or granted Mr. Solomon's motion to  
8 strike Boonsak's testimony. At the very least the court should  
9 have granted Mr. Solomon's motion for a directed verdict. [R.T.  
10 121] as did the court in UNITED STATES vs STROMBERG, 268 F2d 256,  
11 267 (1959). Not to have done so was prejudicial error. The  
12 defendant was effectively convicted upon third- and fourth-hand  
13 hearsay. The appellant therefore respectfully moves this court to  
14 reverse his conviction upon the first count, conspiracy.



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1 for help in selling the heroin implicated Wheaton in that trans-  
2 action. However, Wheaton's prior knowledge of the transaction  
3 cannot be deduced from this conversation, as demonstrated in  
4 Argument I. In fact his responses indicate just the opposite;  
5 the telephone call was the first he had heard of the transaction.  
6 Of course, a man may not be guilty of a conspiracy if he "joins"  
7 after the unlawful object has been completed. SANDEZ vs UNITED  
8 STATES, 239 F2d 239.

9 Participation in a conspiracy may be proved in a number of  
10 ways. According to UNITED STATES vs BENTVENA, supra, citing UNITED  
11 STATES vs AVILES, 274 F2d 179 (1960):

12 A single act may be enough to draw a defendant  
13 within the ambit of a conspiracy . . . Since,  
14 however, the crime of conspiracy requires an  
15 intent to participate in the unlawful enter-  
16 prise, the single act must be such that one may  
17 reasonably infer from it such an intent or the  
18 Government must submit independent evidence that  
19 the defendant knew of the conspiracy and asso-  
20 ciated himself with it.

21 But, continued the court in UNITED STATES vs BENTVENA, supra,  
22 p 949, "such independent proof must be substantial and not 'too  
23 slight'".

24 The ambiguous "um hum" spoken by Wheaton does not qualify  
25 as an agreement. It does not show intent to import and distri-  
26 bute. It is not an act which draws Wheaton within the ambit of  
27 a conspiracy sufficiently to show an intent to participate there-  
28 in. In short, there is insufficient evidence that defendant



1 knew of the conspiracy and associated himself with it.  
2       Wheaton's part in the telephone conversation does not  
3 qualify as a single act sufficient to show his intent to partici-  
4 pate in a conspiracy to import and distribute heroin. What qual-  
5 ifies as a sufficient "single act" has been discussed in man-  
6 cases. In UNITED STATES vs TORRES, 503 F2d 1120 (1974) defendant's  
7 argument that delivery of heroin to the Government witness was  
8 insufficient to draw him into the conspiracy to sell the narcot-  
9 ics was rejected, but the court noted that coupled with the act  
10 were statements by the defendant indicating his knowledge of  
11 the conspiracy and the "act" was one in which all the co-  
12 conspirators were involved. (503 F2d 1120 at 1124). A single  
13 purchase of heroin from a conspirator was held insufficient to  
14 support a conviction in UNITED STATES vs AVILES, supra, the court  
15 noting at page 190: "From evidence of knowledge of the conspiracy  
16 and a transaction with one of its members it would be reasonable  
17 to infer intent to participate in it, but there was no such evi-  
18 dence of knowledge here." (Emphasis added). In UNITED STATES  
19 vs DeNOIA, 451 F2d 979 (1971) delivery of a bag of heroin to  
20 government agents at the time and place agreed upon by the con-  
21 spirators and the agents was deemed insufficient to link defend-  
22 ant to the conspiracy.

23       The thread running through all of these cases is that some  
24 act was done by the defendant. Invariably there is testimony from  
25 a government agent with first-hand knowledge that the act was  
26 done or a defendant's own admission of the act. Here Wheaton  
27 made no attempt to pick up the two units nor did he indicate if  
28 he ever would. When Boonsak asked Wheaton to help him, Wheaton

1     replied, "I don't know. . . I'll have to get back with you man  
2     because I not going to be in New York for a while." He did not  
3     return Boonsak's telephone call or ask him to send the two units  
4     or bring the two units to him. The cases all require a qualitatively  
5     more important act than the utterance of two words, "um  
6     hum" from which to infer intent to participate in a conspiracy.  
7     As Judge Learned Hand stated in UNITED STATES vs FALCONE, 109 F2d  
8     578, 581 (1940), ". . . his attitude towards the forbidden under-  
9     taking must be more positive."

10         Secondly, the telephone conversation was insufficient evi-  
11     dence to establish his participation in the February conspiracy.

12         Here again, the cases confirm that something more tangible  
13     is required than those two simple words Wheaton spoke on March  
14     23. One of the defendants in UNITED STATES vs MASULLO, 489 F2d  
15     217 (1973) was found to be a conspirator by testimony which  
16     showed that he was sent by the narcotic supplier to count the  
17     buyers' money before delivery of "speed", and was later observed  
18     by agents carrying a bag which could be inferred to contain the  
19     "speed" which was eventually sold to the agents.

20         Circumstantial evidence used to convict defendant in UNITED  
21     STATES vs RIZZUTO, 504 F2d 419 (1974) included registering in a  
22     hotel under a false name, a visit to the narcotics buyer's room  
23     in the same hotel, the buyer's departure from the area of  
24     Rizzuto's room with \$122,000 in an attache case, and later return  
25     with the heroin while Rizzuto waited in the room. In UNITED  
26     STATES vs STROMBERG, supra, defendants were charged with conspiracy  
27     to bribe customs officials and with violation of narcotics laws.  
28     The convictions of two of these defendants, Customs Inspectors



1 Samnick and Danis, were reversed on evidence which certainly was  
2 more substantial than that which led to Wheaton's conviction.  
3 Evidence against these defendants included (a) their presence on  
4 several occasions in the company of three of the conspirators; (b)  
5 the fact that one of the heroin dealers described both defendants  
6 on separate occasions to the government witness as "one of his  
7 Customs men"; (c) the fact that one of the conspirators told the  
8 witness of the active assistance of Customs Inspectors; (d) a post-  
9 dated check which one of the conspirators said was for Samnick;  
10 and (e) in a discussion between the witness and Samnick about the  
11 difficulty of getting narcotics through Customs, Samnick reportedly  
12 said, "By boat or by plane the best way to do it is to use two  
13 big suitcases." And in the same vein on another occasion Danis  
14 said that "if he wanted, he can go with a truck across." (Footnote  
15 at p 267). In reversing their convictions the court noted at page  
16 267 that as to the two statements in (e) ". . . each might not  
17 unreasonably be construed only as hypothetical comment. . ."

18 Boonsak's statement, "And why not, if you can help me you  
19 take this two units then after you selling you send the money to  
20 the Boonterm directly, okay." must also be construed as a hypo-  
21 thetical question to which Wheaton's "Um hum" is the hypothetical  
22 answer.

23 More directly applicable to this case is UNITED STATES vs  
24 HYSOHION, 448 F2d 343 (1971) wherein the conspiracy convictions  
25 of all defendants were reversed. This case is an excellent  
26 example of what is insufficient evidence to find a conspiracy.  
27 There Hysohion told the witness Everett that he and Rimbaud could  
28 supply him with "drugs and junk", delivery to be made in June.

1 Hysohion later told Everett that delivery would be made at a  
2 coffee house in Manhattan. In a later conversation Rimbaud offer-  
3 ed to supply Everett with two kilograms of narcotics in May, using  
4 the same delivery system. At the appointed time the third defend-  
5 ant, Roupinian, appeared and displayed the heroin. The court  
6 observed:

7 We find no evidence in the record and nothing  
8 in the findings below which would support the  
9 existence of an unlawful agreement. The fact  
10 that Rimbaud told Everett, a willing buyer, how  
11 to make contact with a willing seller does not  
12 necessarily imply that there was an agreement  
13 between that seller, who was Roupinian, and  
14 Rimbaud. (448 F2d at p 347).

15 Here there is even less evidence to charge the defendant with  
16 conspiracy. A willing seller (who, incidentally, had nothing to  
17 sell) contacts Wheaton, who makes no attempt to formulate any  
18 plan or relationship with, or even encourage, the seller. This  
19 presents a much weaker case than the STROMBERG and HYSOHION cases,  
20 supra, discussed above where the evidence was held insufficient.

21 The court's comment in UNITED STATES vs FALCONE, supra, at  
22 page 581, is most appropriate:

23 It is not enough that he does not forego a nor-  
24 mally lawful activity . . . he must in some  
25 sense promote their venture himself, make  
26 it his own, have a stake in its outcome.

27 To paraphrase the court's later comment at page 581:

28 We may agree that morally the defendant at



1 bar should have refused to listen to Boonsak  
2 at all; but, both morally and legally, to do  
3 so was toto coelo different from joining with  
4 him in selling the heroin.

5 What could be less positive than Wheaton's responses to  
6 Boonsak on the telephone? They do not contain the two elements  
7 necessary to link him to the February transaction. One of these  
8 elements is, of course, the intent to accomplish the purpose of  
9 the conspiracy, i.e. importation and distribution of heroin, and  
10 since a conspiracy to commit a particular substantive objective  
11 cannot exist without at least the degree of criminal intent neces-  
12 sary for the substantive offense itself (INGRAM vs UNITED STATES  
13 360 U.S. 672 [1959]), defendant's conviction on all counts must  
14 be reversed.

15 Aside from the fact that Wheaton never agreed to help anyone,  
16 the crucial element of the agreement itself is missing in this  
17 case because Boonsak had no intention of making an agreement him-  
18 self and certainly no intention of achieving any unlawful obje-  
19 tive. In testimony at trial, agent Taylor testified under cross-  
20 examination [R.T. p 87, lines 2-12] that he gave Boonsak instruc-  
21 tions as to how to conduct the telephone conversation with Wheaton.  
22 Boonsak's purpose when he called Bruce from the office of the Drug  
23 Enforcement Administration after his arrest was not to form an  
24 agreement of any kind but to implicate Wheaton in the transaction.  
25 At the instigation of government agents Boonsak pretended that he  
26 had heroin to sell and invited Wheaton to join with him. No  
27 evidence was produced to show that Wheaton made an agreement with  
28 any of the other parties relative to this transaction. A conspir-

1 ator has to agree with somebody, but surely an agreement cannot  
2 be concluded with one who has no intent to make it. One court  
3 has defined the agreement as ". . . an advancement of the inten-  
4 tion which each has conceived in his mind; the mind proceeds from  
5 a secret intention to the overt act of mutual consultation and  
6 agreement." STATE vs CARBONE, 10 N.J. 329, 336-337 (1952). In  
7 other words, Boonsak lacked the critical mental state so necessary  
8 for an agreement; either the intent to agree or the intent to  
9 import and distribute mental state. One reason for the latter  
10 was, of course, that Boonsak possessed no heroin. Under these  
11 circumstances there can be no conspiracy. See, for example,  
12 DeLANCEY vs STATE, 164 Tenn. 432.

13 Since it is clear from the above that defendant was in no  
14 way involved in the February transaction, it is difficult to  
15 ascertain in exactly what conspiracy Wheaton was involved. Per-  
16 haps the government is attempting to show that there was a larger  
17 international conspiracy to import and distribute heroin, of which  
18 the alleged purchase by Bruce from Boonterm of two or three units  
19 was a part. Under the authorities cited above (see page 22) this  
20 alleged purchase cannot qualify as the conspiracy. See also  
21 UNITED STATES vs SPERLING, 506 F2d 1323 (1974) and UNITED STATES  
22 vs STROMBERG, supra. First, there is insufficient evidence that  
23 this purchase ever took place and the clear import of these cases  
24 is that an act must be done by the defendant. Invariably, one  
25 finds direct testimony from government witnesses concerning that  
26 act or defendant's own admission of it. Here testimony concerning  
27 that alleged act came entirely from Boonsak. His uncorroborated  
28 testimony came from Manop Saiphantong. Since Manop never direct-



1 ly attributes his information to Boonterm it was fourth- or  
2 fifth-hand hearsay by the time Boonsak told the story. Hearsay  
3 such as this is the most unreliable, rankest sort of evidence  
4 upon which to convict a man.

5 Evidence introduced by the government was insufficient to  
6 show Wheaton's involvement in a larger conspiracy. Wheaton's  
7 trip to Thailand is meaningless; the piece of paper bearing his  
8 name in Boonsak's possession allegedly relates to a different  
9 matter entirely and the tape recorded telephone conversation  
10 (Exhibit 67) relates in no way to this supposed two or three  
11 unit purchase. The letter from Boonterm to Bruce Wheaton assign-  
12 ing 1/2 harp "tur" was never received by Wheaton as it was seized  
13 by federal agents before delivery. Even so, it is noteworthy that  
14 the letter directly conflicts with Boonsak's testimony wherein  
15 he refers to a deal involving two or three units. One is left  
16 with highly circumstantial evidence that the transaction took  
17 place. Moreover, it appears that in his attempt to prove that  
18 the two or three unit transaction links Bruce Wheaton to a large  
19 international conspiracy, the prosecutor has confused the proof  
20 requirements.

21 The cases cited above clearly require proof that an act was  
22 done in order for that act to be used as circumstantial evidence  
23 of involvement in a broader conspiracy. This is entirely differ-  
24 ent that using circumstantial evidence of the act as circumstan-  
25 tial evidence of defendant's participation in a broader conspir-  
26 acy. Furthermore, if there was such a broad conspiracy, it would  
27 still only encompass the February transaction and the alleged two  
28 or three unit transaction within the period of the indictment.

1 By adding together the circumstantial evidence of the two or three  
2 unit transaction with the February transaction, the government  
3 has attempted to create an international conspiracy, hoping  
4 thereby to hold Wheaton liable on the February transaction in  
5 which he was not involved, presumably on the theory that knowledge  
6 of all phases of that conspiracy is not required. See, for  
7 example, UNITED STATES vs QUINN, 445 F2d 240 (1970). The end  
8 result is that circumstantial evidence is used to create the two  
9 or three unit transaction, which in turn is used as the circum-  
10 stantial evidence that a broader conspiracy existed, then the  
11 two or three unit transaction is used to link Wheaton to the  
12 broad conspiracy so that he can be convicted of the February  
13 transaction in which he did not participate. Appellant requests  
14 that the court recognize this for what it is - a most flagrant  
15 example of circular bootstrapping, and reverse the conviction of  
16 the appellant.

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1 alone.

2 Approximately two and one-half hours after the jury retired it  
3 requested a further instruction [R.T. 180], "Does membership in a  
4 conspiracy make one responsible for all acts of the other members,  
5 whether known or unknown?" The judge instructed, in essence, yes.  
6 The jury retired, and in five minutes returned a verdict of guilty  
7 on the substantive counts. It is obvious that when further  
8 instructions were requested the jury had already decided that  
9 Wheaton was guilty of the conspiracy, and being so must be guilty  
10 of the substantive counts.

11 However, the court must reverse the conviction of Wheaton  
12 on the conspiracy count as demonstrated in the first two arguments.  
13 When the conspiracy count is reversed the substantive counts must  
14 also be reversed. Wheaton cannot be convicted for the acts of  
15 Boonsak, Head, Boonterm, Manop and Perm when he never joined in  
16 their conspiracy. Appellant, therefore, requests that his conviction  
17 for importation and distribution be reversed.

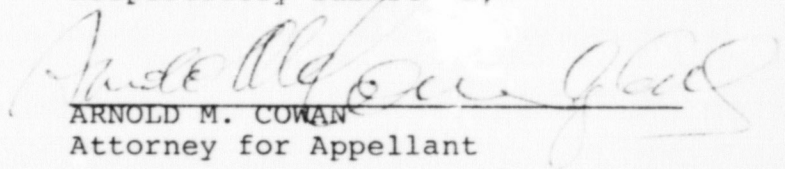
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CONCLUSION

For the foregoing reasons Appellant urges that the case be reversed.

Respectfully submitted,

  
ARNOLD M. COWAN  
Attorney for Appellant



1 STATE OF CALIFORNIA )  
2 COUNTY OF LOS ANGELES ) ss.

3 I am a citizen of the United States and a resident of the  
4 County aforesaid; I am over the age of eighteen years and not a  
5 party to the within entitled action; my business address is 221  
6 Avenue I, Redondo Beach, CA 90277.

7 On the 17th day of August, 1976, I served the within APPEL-  
8 LANT'S OPENING BRIEF on the respondent in said action by placing  
9 a true copy thereof enclosed in a sealed envelope with postage  
10 thereon fully prepaid, in the United States Post Office mail box  
11 at Redondo Beach, California addressed as follows:

12 UNITED STATES ATTORNEY  
13 Southern District of New York  
14 United States Courthouse  
15 Foley Square  
16 New York, NY 10007

17 I declare under penalty of perjury that the foregoing is true  
18 and correct.

19 Executed on August 17, 1976 at Redondo Beach, California.

20 Judy Clemens  
21 JUDY CLEMENS  
22  
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APPENDIX TO APPELLANT'S OPENING BRIEF

APPENDIX

1		
2	I	Docket Entries
3	II	Indictment dated March 25, 1976
4	III	Charge to the Jury
5	IV	Opinion Below
6	V	Exhibits:
7		A. #17 - Envelope
8		B. #18 - Letter
9		C. Transcription of Letter
10		D. #67A - Transcription of Telephone Conversation.
11	VI	Relevant Portions of Record:
12		A. Stipulation
13		B. Motions by Mr. Solomon:
14		1. to strike testimony
15		2. for directed verdict
16		3. to set aside verdict
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PAGINATION AS IN ORIGINAL COPY



## CRIMINAL DOCKET - U.S. District Court

OFFENSE NO. ☐ JUDGE ~~XXXXXX~~ Assigned U.S.  
 JUDGE OFFENSE NO. ☐ 0334  
 JUDGE OFFENSE NO. ☐ 0208 1  
 FELONY NO. ☐ 0208 1

VS. WHEATON, BRUCE

(LAST FIRST MIDDLE)

Case Filed

Mo. Day

03 25

76 0295

02

No. of Defs

\* 06

JUVENILE

U.S. MAG.  
CASE NO.

BAIL - RELEASE

☐ AMT ☐ Fugitive  
☐ Bond ☐ Park Release

☐ Date ☐ Conditions  
☐ Bail Not Made ☐ Collateral

☐ Status Changed ☐ Bail Paid ☐ Other

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U.S. DISTRICT SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

21:846

Conspir. to viol Narco. Laws.

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21:812, 951, 952

Importation to U.S. of Heroin I.

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21:812, 841

Distr. &amp; possess. of Heroin I.

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## II. KEY DATES &amp; INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began 3-8-76	High Risk Date 3-25-76	1st Plea Final Plea	Trial Set For Trial Began Trial Ended	Disposition of Charges On All Charges On All Charges On All Charges
Summons Served	Indict. Waived	Supervising Indict. Info	U.S. Plea U.S. Plea U.S. Plea	Dismissed WOP WOP
First Appearance	In Charging District			

## MAGISTRATE

SEARCH WARRANT	DATE	INITIAL/NO	INITIAL APPEARANCE DATE	INITIAL/NO	OUTCOME
Issued Returned			Preliminary Examination OR Removal Hearing		Dismissed Held for 60 or other PROCEEDING IN THIS DISTRICT
Summons Served			Waived NOT WAIVED		Held for 60 or other PROCEEDING IN THIS DISTRICT
Arrest Warrant Issued			INTERVENING INDICTMENT		
COMPLAINT					
OFFENSE (in Complaint)					

U.S. Attorney or Asst

ATTORNEYS

Defense ☐ JGA ☐ JRC ☐ Waived ☐ Set ☐ None / Other ☐ JGA

Federico E. Virella, Jr.  
 791-1984

Abraham Solomon  
 85 Baxter St. NYC 10013  
 431-6542

\* Show last names and suffix numbers of other defendants on same indictment/information.

Head, et al.

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
3-25-76		Filed indictment.	
4-5-76		Def't. No appearance. Court directs entry of not guilty plea be entered. B/W ordered. Assigned to MacMahon, J. Lasker, J.	
3-31-76		Filed Magistrate's warrant of arrest. (Form A.O. 90).	
4-19-76		Remand issued.	
4-19-76		Def't Bruce Wheaton present. (No Att'y) Bail fixed at \$50,000 unsecured P.R.B. to be co-signed by def't's mother. Def't to call Prosecutor's office every Friday. Surrender any passport he may possess. Ordered fingerprinted & photographed. Def't advised that N.G. plea was entered on his behalf.....PIERCE, J.	
4-19-76		Filed Appearance Bond in the sum of \$50,000, Unsecured. Co-signed by def't's mother.	





D. C. 110 Rev. Civil Docket Continuation

Page #3

DATE

PROCEEDINGS

Date Order  
Judgment

exercise of its discretion, declines to sentence the def't as a YOUNG ADULT OFFENDER. The def't is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS & THREE (3) YEARS SPECIAL PAROLE on each of Counts 1, 4 & 5. the sentences to run concurrently with each other.....MAC MAHON, J.  
(Advised of right to appeal)

5-26-76

Filed Deft's notice of appeal to the USCA from the judgment & conviction entered 5-24-76. Copies sent to Robert B. Fiske, Jr. U.S. Attorney, & to Bruce Wheaton, Metropolitan Correctional Center, 150 Park Row, New York, N.Y., 10007.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

76 CRIM. 0295

UNITED STATES OF AMERICA,

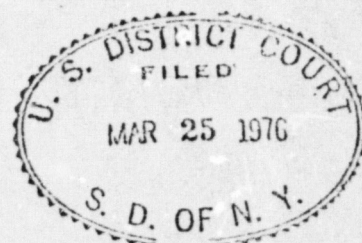
- v -

DONALD HEAD, a/k/a "Mr. Don",  
BRUCE WHEATON,  
BOONTERM PETKAMNERD,  
BOONSAK PHUVASITKUL, a/k/a "Sammy",  
MANOP SAIPHANTONG, and  
PERM PETKAMNERD,

Defendants.

INDICTMENT

76 Cr.



The Grand Jury charges:

1. From on or about the 1st day of September, 1975 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, DONALD HEAD, a/k/a "Mr. Don", BRUCE WHEATON, BOONTERM PETKAMNERD, BOONSAK PHUVASITKUL, a/k/a "Sammy", MANOP SAIPHANTONG, and PERM PETKAMNERD the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 959, 960(a)(1), 960(a)(3) and 960(b)(1) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and others unknown unlawfully intentionally and knowingly would manufacture and distribute large amounts of heroin, a Schedule I narcotic drug controlled substance, in Thailand and elsewhere intending and knowing that the said heroin would be unlawfully imported into the United States, in violation of Sections 812, 959, 960(a)(3) and

MICROFILM

MAR 25 1976

F. Jr.:b  
n-1707

960(b)(1) of Title 21, United States Code.

3. It was further part of said conspiracy that the said defendants and others unknown to the Grand Jury, unlawfully, intentionally and knowingly would import into the United States from places outside thereof, to wit, Thailand, quantities of heroin, a Schedule I narcotic drug controlled substance, the exact amount being unknown to the Grand Jury, in violation of Sections 812, 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

4. It was further part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute heroin, a Schedule I narcotic drug controlled substance, the exact amount thereof being to the Grand Jury unknown in violation of Section 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

THE MEANS USED BY THE DEFENDANTS TO  
ACCOMPLISH THE OBJECTS OF THE CONSPIRACY

5. Among the means whereby the defendants and others unknown to the Grand Jury would and did carry out the objects of said conspiracy, and insure the success of the unlawful venture to import, buy, sell and distribute heroin for profit, were the following:

(a) The defendants BOONTHEM PETKAMNERD, MANOP SAIPHANTONG and PERM PETKAMNERD were Thai nationals who served as sources of supply for multi-kilogram quantities of pure heroin to be shipped by their co-conspirators to the United States.



(b) The defendant DONALD HEAD, a/k/a "Mr. Don", is and was at all times relevant to this Indictment a Staff Sergeant in the United States Air Force assigned to the United States Air Mail Military Terminal, Air Force Post Office, located at Don Muang, Thailand as a postal chief supervisor. Using this official position, the defendant DONALD HEAD, a/k/a "Mr. Don", would and did use the United States Military postal system to mail large quantities of heroin into the United States.

(c) Upon arrival in the United States, the heroin was purchased and re-distributed by the defendants BRUCE WELTON and BOONSACK PHUVASITKUL, a/k/a "Sammy".

#### OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about September, 1975, the defendants BOONSACK PHUVASITKUL, a/k/a "Sammy", and MANOP SAIPHANTONG had a conversation in Bangkok, Thailand.
2. In or about December, 1975, the defendants BOONTHEM PETKAMHERD, BOONSACK PHUVASITKUL, a/k/a "Sammy", MANOP SAIPHANTONG, and PERM PETKAMHERD met in a coffee shop located in Bangkok, Thailand where they had a conversation regarding the importation of heroin from Thailand into New York, New York.
3. In or about February 4, 1976, the defendants DONALD HEAD, a/k/a "Mr. Don", BOONTHEM PETKAMHERD, BOONSACK PHUVASITKUL, a/k/a "Sammy", MANOP SAIPHANTONG and PERM PETKAMHERD met in an apartment house located at Soi 13 in Bangkok, Thailand where they discussed the mailing of approximately 700 grams of heroin into New York, New York from Bangkok, Thailand.



United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

DONALD HEAD, a/k/a "Mr. Don,"  
BRUCE WHEATON,  
BOONTERM PETKANNER,  
BOONSAT PHUVASITKUL a/k/a "Sammy,"  
MANOP SAIPHANTONG, and  
PERM PETKANNER,

Defendants.

INDICTMENT

76 Cr.

(21, U.S.C. §§812, 841(a)(1),  
841(b)(1)(A), 846, 951, 952(a),  
959, 960(a)(3), 960(b)(1), and  
963; 18, U.S.C. §2)

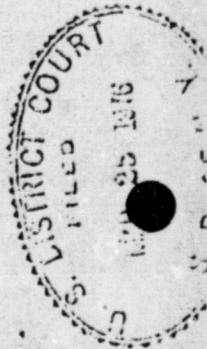
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

*A. J. Fiske, Jr.*  
Foreman.

FPI-SS-2-19-71-20M-50.00



MAR 25 1976

Indictment filed. Bureau

MAR 25 1976

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Bureau

4. In or before February 15, 1976, in Bangkok, Thailand, the defendant BOONTERRI PETKAMUEND gave the defendant BOONSAN PHUVASITKUL, a/k/a "Sammy", a clip of paper containing the address of the defendant BRUCE WHEATON which read as follows:

"Bruce E. Wheaton, 1048 E 223 S.T.,  
Bronx 10466 New York, U.S.A."

5. In or about March 8, 1976 the defendant BOONSAN PHUVASITKUL, a/k/a "Sammy", had a conversation in New York, New York with undercover agents regarding the mailing of heroin from Thailand.

6. In or about March 10, 1976 the defendants BOONSAN PHUVASITKUL, a/k/a "Sammy" and DONALD HEAD, a/k/a "Mr. Don", had a telephone conversation concerning the mailing of money from New York, New York to Bangkok, Thailand.

7. In or about March, 1976 the defendant DONALD HEAD, a/k/a "Mr. Don", had in his possession approximately \$26,800 in cash at Don Muang, Thailand.

8. In or about March, 1976 the defendants BOONSAN PHUVASITKUL, a/k/a "Sammy", and BRUCE WHEATON had a telephone conversation concerning the sale of two units of heroin.

(Title 21, United States Code, Section 846 and 961.)



COUNT TWO

The Grand Jury further charges:

On or about the 18th day of April, 1975 in the Southern District of New York, BOONMAK PHANASTHAR, a/k/a "Sammy" the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 101 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

In or before February, 1976, in Thailand and elsewhere, BOONHEM PHANASTHAR, PHANOP SAIPIANTONG, and PHUM PHANASTHAR, the defendants, unlawfully, intentionally and knowingly did manufacture and distribute and caused to be manufactured and distributed a Schedule I narcotic drug controlled substance to wit, unknown amounts of heroin hydrochloride, intending and knowing that such substance would be unlawfully imported into the United States.

(Title 21, United States Code, 812, 959, 960(a)(3), and 960(b)(1); Title 18 United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 23rd day of February 1976, in the Southern District of New York, DONALD HEAD, a/k/a "Mr. Don", BRUCE WHEATON, BOONTHEE PAKKASEED, BOONSAM PHUWASITUL, a/k/a "Sunny", PALOP SAMPANTONG, and PERA PAKKASEED, the defendants, unlawfully, intentionally and knowingly did import and caused to be imported into the customs territory of and into the United States, to wit, New York, New York, from a place outside thereof, Bangkok, Thailand a Schedule I narcotic drug controlled substance, to wit, approximately 638 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 813, and 814); and Title 18, United States Code, Section 351.)

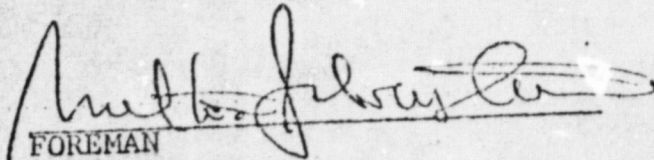


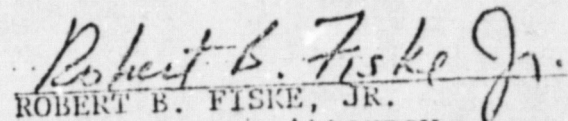
COUNT FIVE

The Grand Jury further charges:

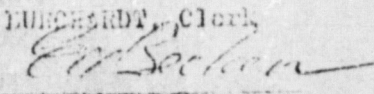
On or about the 23rd day of February, 1976 in the Southern District of New York, DONALD HEAD, a/k/a "Mr. Don", BOONTERM PETKAMNERD, BOONSAK PHUVASITKUL, a/k/a "Sammy", BRUCE WHEATON, MANOP SAIPHANTONG, and PERM PETKAMNERD, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 638 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

  
FOREMAN

  
ROBERT B. FISKE, JR.  
United States Attorney

A TRUE COPY  
RAYMOND E. MURCHESON, Clerk

By   
Deputy Clerk

1/76  
v. Wheaton  
Cr. 295

1 rdmch

CHARGE OF THE COURT

MacMahon, J.

THE COURT: We have now reached the point in the trial where it becomes my function to instruct you on the law that applies to this case. Now, I am the exclusive judge of the law. You are bound by your oath to accept the law as I give it to you, whether or not you agree with it, or whether or not you like it, or whether you think the law ought to be something different from what it is. Now, that is my role.

Now, your role is to decide what the facts are. Where does the truth lie in this case? And that is your exclusive role and I must accept what you do, whether I like it, or whether I have some different view about it.

In short, I am the exclusive judge of the law and you are the exclusive judges of the facts.

You and you alone decide what weight, what effect and what value you will give to the evidence. You and you alone decide whether to believe a witness, and you and you alone decide ultimately whether this defendant is guilty or not guilty on the charges submitted to you in this case, and here he is charged in Counts 1, 4 and 5 of this indictment.



1 2 rdmch

2 Now, you are not to conclude from any rulings  
3 that I have made throughout this trial or any questions  
4 that I asked that I have any opinion, one way or the other,  
5 as to what your decision should be or as to the guilt or  
6 innocence of this defendant. That decision is exclusively  
7 up to you, as I have just told you.

8 How do you go about finding the facts? Finding  
9 the facts is merely a process by which you members of the  
10 jury consider all of the exhibits which have been received  
11 in evidence, consider the testimony of all of the witnesses  
12 on direct and on cross-examination. Sift out what you  
13 believe, weigh it in the scale of your reasoning powers,  
14 and draw such conclusions as your intelligence and common  
15 sense tell you the evidence supports and justifies, and  
16 decide just what the facts are in this case.

17 Now, in this connection, all evidence is of  
18 two general types: direct evidence and circumstantial  
19 evidence.

20 Evidence is direct when the facts are shown  
21 by exhibits which are admitted into evidence or when  
22 sworn to by witnesses who have actual knowledge of them,  
23 learned through the exercise of one of their fundamental  
24 senses: something that the witness has seen, something that  
25 he has heard, something that he has touched, something

1 3 rdmch

2 that he has tasted, and so on.

3 Now, circumstantial evidence simply means  
4 the drawing of a logical conclusion from the connected  
5 facts shown by direct evidence. The classic example of  
6 circumstantial evidence is Robinson Crusoe's sighting of  
7 the footprint on the sand. He knew, knowing as he did that  
8 it was not his footprint, that the only logical conclusion  
9 to draw was that there was another human being on the  
10 island.

11 Not all evidence is quite as obvious or as  
12 compelling as that, but you can see that circumstantial  
13 evidence is every bit as valuable and sometimes far more  
14 persuasive than direct evidence.

15 No greater degree of certainty is required  
16 when evidence is circumstantial than when it is direct,  
17 for in either case you must be convinced beyond a reasonable  
18 doubt before you can find the defendant guilty.

19 Now, in this connection, as I told Mr. Anderson  
20 when he was taking notes, it is your memory of the evidence  
21 that controls. It is not the way I remember it, and not  
22 the way counsel -- not necessarily the way counsel  
23 remember it.

24 I have no intention whatever in this brief case  
25 to review the evidence. If your memory of the evidence



1 4 rdmch

2 squares with what the lawyers told you as they were making  
3 their closing arguments as their version of the evidence,  
4 you can accept what they said. But if you have a different  
5 memory you are bound by your oath to reject what they said  
6 and rely on your own memory.

7 Now, when I say "your own memory" I mean your  
8 collective memory. If one of you can't remember the  
9 evidence, you can perhaps have your recollection refreshed  
10 by another juror's memory of it. But if in the end you  
11 can't remember it and you do want part of the evidence  
12 read to you, we will have the court reporter dig out  
13 from his notes the part that you want. If you reach that  
14 process, you must pinpoint what you want, and it does take  
15 time to find it. There is no written transcript of this  
16 testimony at this point. He has to go through his steno-  
17 graphic notes and you have to hear it both on direct and  
18 on cross-examination. So use some restraint about that.

19 The evidence here isn't all that complicated,  
20 and it consists mainly of the testimony of Boonsak  
21 Phuvastikul, the transcripts and tape recordings of  
22 telephone conversations, and the exhibits which lie before  
23 you there on counsel table, and I will send in all of those  
24 exhibits in your deliberations so that you will have them  
25 before you.

reach 5

Now, your most important function is to decide which witnesses you will believe. This is so as to every witness, whether the witness is called by the Government or not. You are not to be influenced by the number of witnesses. You are concerned with the quality and not the quantity of evidence.

The first test you should apply in determining whether to believe a witness is to measure what he says against your plain, everyday common sense.

You saw the witnesses in this case. In deciding whether to believe a witness you should consider his manner on the stand. I saw you watching these witnesses with particular care as they were testifying. How did the witness impress you? Was the witness being frank with you or was he being evasive? Does the witness have any motive to testify falsely? Is he interested in any way in the outcome of this case? How strong or how weak was his memory of important events? In short, can you rely on him?

You ought to consider his opportunity to know the facts about which he testified and the probability or improbability of what he said. And probably more significantly than anything else, how does his testimony check out with the documentary exhibits? Here were these



1 rdmch 6

2 recorded telephone conversations which can't be changed, ✓  
3 which can't lie. There they are. How does his story check  
4 out with that? Are there any inconsistencies in his  
5 testimony and, if so, how important are they?

6 Now, the defendant, Bruce Wheaton, did not take  
7 the stand. The defendant is not required to take the  
8 stand and testify in his own behalf. He has no burden of  
9 proof whatever to sustain in this case. He has denied  
10 the charges made against him here by his plea of not  
11 guilty and he is presumed to be innocent. The fact that  
12 he has not testified cannot be taken into consideration  
13 by you in any manner. You may not permit that fact to  
14 weigh in the slightest degree against the defendant Wheaton,  
15 nor should that fact enter into your deliberations or your  
16 discussions in any way.

17 Boonsak Phuvastikul testified that he participated  
18 in the crimes charged here, and as you have heard he pleaded  
19 guilty to those charges. He claims that he was an  
20 accomplice in this conspiracy, and you should therefore  
21 consider that fact in testing his credibility and in  
22 weighing his testimony.

23 Obviously, a witness is not incapable of telling  
24 the truth about what occurred because he claims to be  
25 an accomplice, but you must examine his testimony with

1 rdmch 7

2 special care and act upon it with caution.

3 In the prosecution of crime the Government is  
4 frequently called upon to use persons who are accomplices.  
5 Often it has no choice. They are properly used. After  
6 all, the Government must rely upon witnesses to transactions,  
7 whoever they are; otherwise, in many cases it would be  
8 difficult to detect and to prosecute wrongdoers. This is  
9 particularly so in cases of conspiracy. Frequently it  
10 happens that only those on the inside of the scheme can  
11 give evidence which is material and important to the case,  
12 because conspiracies are almost always conducted in secrecy  
13 and with concealment.

14 Now, there is no requirement that the testimony  
15 of an accomplice like Phuvastikul be corroborated or  
16 supported -- by that I mean that it be backed up or that  
17 it check out with the other evidence. Obviously, if it  
18 does check out, that is a fact to which you should give very  
19 significant weight ; .

20 A conviction may rest upon the testimony of  
21 an accomplice alone, even if it doesn't check out, if you  
22 believe what he says.

23 Now, the credibility of Phuvastikul, like that  
24 of all other witnesses, is for you and you alone to  
25 determine, taking into account any interest that he may



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have, any motive that he may have, any inducement or consideration he may have received or hopes to receive from the Government, any hostility that he may bear toward any defendant, and any other evidence which you recall which may reasonably be considered to influence or color his testimony.

Now, if any of you find that any witness has deliberately lied as to any material fact in his testimony offered on this trial, you may follow one of two courses: If you wish, you can reject everything he said; or, if you wish, you can accept as much as you believe and reject the rest.

Before discussing the crime charged here, I want to remind you that an indictment is a mere accusation. It is not evidence of the truth of the charge made, and you are to draw no inference of guilt from the mere fact that the defendant has been indicted. An indictment simply means that the defendant has been accused of a crime.

The defendant, as I explained earlier, has denied the charges made here by his plea of not guilty, and he has no burden of proof to sustain in this case. He is under no obligation to produce any witnesses. On the contrary, he is presumed to be innocent, and this presumption of innocence continues throughout the trial

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and during the deliberations of the jury. This presumption of innocence is overcome when, and only when, you are satisfied that the Government has established the guilt of the defendant beyond a reasonable doubt.

Now, what do I mean by "beyond a reasonable doubt"? I don't mean beyond every possible doubt. As the phrase implies, a reasonable doubt is a doubt that is based upon reason, a reason which appears in the evidence or in the lack of evidence. It is not some vague, speculative, imaginary doubt, nor a doubt based upon emotion, sympathy or prejudice, or upon what some juror might regard as an unpleasant duty.

The Government is not required to prove this defendant's guilt beyond every possible doubt, or to an absolute certainty, or to a mathematical certainty, or anything like that, because such measure of proof is usually impossible in human affairs.

You should review all of the evidence as you remember it. Sift out what you believe, discuss it and weigh it and compare your view of the evidence with that of your fellow jurors. If that process produces a solemn belief or conviction in your mind, such as you would be willing to act upon without hesitation if this were an important matter of your own, then you can say that you



1 rdmch 10

2 have been convinced beyond a reasonable doubt.

3 On the other hand, if your mind is wavering  
4 or so uncertain that you would hesitate before acting if  
5 this were an important matter of your own, then you have  
6 not been convinced beyond a reasonable doubt.

7 Now, the indictment in this case contains five  
8 counts, but only Counts 1, 4 and 5 are here for your  
9 decision. Each of those counts charges a separate offense  
10 or crime and each must be considered separately.

11 I also wish to point out that although the  
12 indictment names six defendants only the defendant Bruce  
13 Wheaton is on trial before you, and you should not speculate  
14 and it is no concern of yours what, if anything, has  
15 happened to those other defendants.

16 In that connection, you have heard that the  
17 witness Phuvastikul was a defendant in this case and that  
18 he has pleaded guilty. I want to caution you that guilt  
19 under our system of law is an individual proposition, and  
20 you are to draw no inference of guilt in any way against  
21 defendant Wheaton Phuvastikul's guilt is no proof whatever  
22 of the defendant Wheaton's guilt. This defendant's guilt must  
23 be decided solely upon the evidence here against him,  
24 his guilt or innocence.

25 So the only person whose guilt or nonguilt you

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must announce in your verdict in this case is the defendant Bruce Wheaton, although, as I will explain to you shortly, in considering his guilt or his innocence you may have to determine the nature of the participation of other persons in the alleged conspiracy.

Now, there is no such thing under our law or our system of justice as guilt by mere association. The guilt of this defendant must be determined separately with respect to him solely on the basis of the evidence presented against him or on the lack of evidence.

Let us turn now to the specific charges in this case.

The first count of the indictment charges a conspiracy. It charges that Donald Head, also known as "Mr. Don," Bruce Wheaton, Boonterm Petkamnerd, Boonsak Phuvastikul, also known as "Sammy," Manop Saiphantong and Perm Petkamnerd, together and with others to the grand jury unknown, conspired to violate the federal narcotics laws.

Now, in order to convict the defendant Wheaton on Count 1, the Government must prove to your satisfaction beyond a reasonable doubt three facts:

1. The existence of the conspiracy charged in the indictment.



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2. The defendant Wheaton was a member of that conspiracy. In other words, that he joined it, that he participated with others in that conspiracy, knowing that its unlawful purpose was to smuggle heroin into the United States from Thailand.

3. That any one of the conspirators, not necessarily this defendant, committed at least one overt act in furtherance of the objects of the conspiracy.

I will now explain these elements.

The first element or fact which the Government must prove is the existence of the conspiracy. Now, what is a conspiracy? A conspiracy, for our purposes here, is simply a combination or an agreement among two or more people to commit a crime as charged in the indictment. You will notice that it is the agreement to commit the crime, not the actual commission of the crime itself. Thus, a conspiracy is a kind of a partnership in criminal purposes, and it usually is secret in its origin and in its operations. The gist of the crime is the combination or agreement among two or more people to commit another crime or to violate the law.

By that I do not mean that two or more people must meet and sign some kind of a formal partnership agreement, or that they must sit down in some bar or meet

rdmch 13

on some corner or in some smoke-filled room and agree, in so many words, on what their unlawful plan or scheme is to be, or how they are going to carry it out. When persons enter into a combination or an agreement to deal in heroin or to violate the law, obviously they do not proclaim their plans to the public. Much is left to implication and to tacit understanding. The very nature of a conspiracy calls for secrecy.

The first element is satisfied, therefore, if you find beyond a reasonable doubt that any two or more people in any way intentionally combined or agreed to a common plan, knowingly and intentionally, to violate the federal narcotics laws as charged in this indictment.

Now, in determining whether there was such a combination, understanding or agreement, you should consider all of the evidence about the defendant's conduct, acts and statements. You should consider not only what was said or done but also how it was said or done.

Actions speak louder than words.

You should, therefore, ask yourselves whether the transactions here were conducted in a simple, straightforward, open way, as innocent business transactions are, or whether they were purposely secret and evious and hidden, whether the meetings were open or secret, whether



1 rdmch 14

2 the persons involved used fictitious names, whether they  
3 concealed or tried to conceal their identities in any way,  
4 whether they dealt in large sums of cash and currency  
5 which can't be traced, whether they used veiled language  
6 in their conversations, whether they were cautious and  
7 suspicious in their conversations, whether they used code  
8 words in their conversations, and any other evidence  
9 which you recall and believe as to the manner in which the  
10 defendant conducted his affairs, and whether his dealings  
11 were open and aboveboard or whether they were surrounded  
12 by that secrecy and intrigue which are the very hallmarks  
13 of a conspiracy.

14 From the point of view of the law, there is  
15 danger to the public when two or more people combine to  
16 commit a crime. The danger is greater than if the lone  
17 criminal acts by himself, because there is strength in  
18 numbers, and two or more people are able to accomplish  
19 crimes that are far more complex, far more difficult and  
20 far more harmful to the public. Because of this, a  
21 conspiracy to commit a crime, as I told you earlier, is  
22 a distinct crime in and of itself, separate and apart  
23 from the crime which it is the object of the conspiracy  
24 to accomplish.

25 Thus, a conspiracy may be found to exist even

1 rdmch 15

2 though the purpose of the conspiracy is never accomplished.  
3 Here, for example, a conspiracy could be found to exist  
4 even though there was never one ounce of heroin actually  
5 smuggled into the United States.

6 Proof, however, of the accomplishment of the  
7 objective of the conspiracy, here smuggling heroin into  
8 the United States, is the most persuasive evidence of the  
9 existence of the conspiracy itself.

10 Now, you will note that the period of time  
11 charged in the indictment runs from on or about September 1,  
12 1975, and continuously thereafter up to and including  
13 March 25, 1976. In that connection, you should bear in  
14 mind that we are here trying a case that happened, the  
15 transactions happened, less than three months ago. So  
16 these facts are fresh.

17 It is not necessary for the Government to  
18 prove that the conspiracy alleged started and ended on those  
19 exact or specific dates. It is sufficient if you find that  
20 the conspiracy was formed and that it did exist for some  
21 substantial time within the period set forth in the  
22 indictment.

23 Now, the second fact which the Government must  
24 prove beyond a reasonable doubt on this alleged conspiracy  
25 is that the defendant joined the conspiracy with knowledge



1 rdmch 16

2 of its purpose. Now, when I say "joined the conspiracy,"  
3 I do not mean to say that the defendant has to file some  
4 kind of a formal application for membership or that he  
5 has to sit down with the others and say, "Count me in."  
6 But I do mean that before he can be found to be a member  
7 of a conspiracy he must know of the existence of the  
8 conspiracy, that is, he must know that others have combined  
9 or joined together to violate the law.

10 Here he must know that others have joined  
11 together to smuggle heroin from Thailand into the United  
12 States. He must know of the unlawful purpose, that is  
13 he must know here that the purpose of this conspiracy  
14 was just that, to smuggle heroin from Thailand into the  
15 United States, and he must knowingly join in the venture  
16 with an intent to combine with those others in violating  
17 the law, here smuggling heroin. He must knowingly promote  
18 the unlawful scheme or have a stake in its outcome.

19 Now, you will note that I have said that  
20 the defendant must have acted knowingly, wilfully and  
21 intentionally. Now, this does not mean that the defendant  
22 must be aware that he is violating some law of the United  
23 States, and when you read this indictment you will see that  
24 it sets forth a number of sections of the Criminal Code.

25 For example, the first paragraph of Count 1

1 rdmch 17

2 alleges a violation of Sections 812, 841(a)(1), 841(b)(1)  
3 et cetera. A number of statutes. He doesn't even have to  
4 know that those statutes are in the books or that smuggling  
5 heroin is against the law. "Knowingly" simply means  
6 that he must know what he is doing. Here he must know  
7 that he is joining with others to smuggle heroin into the  
8 United States, that he was participating with others in  
9 a common plan to deal in heroin in the manner charged in  
10 this indictment, and that he did so freely and voluntarily  
11 deliberately, on purpose, and not because of mistake,  
12 accident, carelessness or other innocent reason.

13 Here again, in determining the intent of  
14 the defendant, it is obviously impossible to look into his  
15 mind. However, intent and knowledge may be inferred from  
16 the way a defendant acts, by his statements, and by all  
17 surrounding circumstances.

18 Thus, the old adage, "Actions speak louder  
19 than words," also applies here.

20 In this connection, you may not rely upon  
21 statements of one defendant to find that another defendant  
22 was a member of a conspiracy. You must determine the  
23 membership of this defendant solely upon the evidence  
24 concerning his own actions, his own conduct and his own  
25 statements.



rdmch 18

Now, the mere fact that a defendant may be present when a crime is committed by others, or that he may attend meetings, or that he unwittingly assist the venture or associate or have a friendship with a member of the conspiracy, in itself is not enough to make him a conspirator, unless you first find beyond a reasonable doubt that he knew of the existence of the conspiracy, and that he intentionally joined the venture with knowledge of its unlawful purpose and with a stake in its success.

Now, one may become a member of a conspiracy without knowledge of all of the details or all of the operations or, indeed, the identity of all of the other members of the conspiracy. One defendant may know only one other member of the conspiracy. Yet, if he knowingly cooperates to further the crime of the conspiracy, which it is the object of the conspiracy to accomplish, with knowledge that others have combined to violate the law, he becomes a member, although his role may be only an insignificant or subordinate one.

If you find that the defendant did join the conspiracy with knowledge of its illegal purposes, then he is bound by what other members of the conspiracy say and do after he joins, provided that what they say and is said or done in furtherance of the purposes of the

1 conspiracy. And that is true even though he, himself, is  
2 not present, provided he is still a member. Each conspira  
3 is the agent or partner of every other conspirator.  
4 What one does to promote the illegal plan or the illegal  
5 agreement binds every other member of the conspiracy.  
6

7 Now, the third element of the crime the crime  
8 of conspiracy which the Government must prove beyond a  
9 reasonable doubt is that one, at least one, overt act  
10 was committed by one of the members of the conspiracy in  
11 furtherance of the object of the conspiracy.

12 Now, what is an overt act? An overt act  
13 means an act by any member of the conspiracy in an effort  
14 to accomplish some purpose of the conspiracy. The reason  
15 the law of conspiracy requires an overt act is because a  
16 person might agree to commit a crime and then change his  
17 mind. Therefore, before a defendant can be convicted of  
18 a conspiracy, one or more of the conspirators must have  
19 taken at least one step or performed one single act  
20 which moved directly toward carrying out the unlawful  
21 intent to commit the crime.

22 The Government has alleged eight overt acts  
23 and you will note upon reading the indictment that some  
24 of these acts are innocent in and of themselves. For  
25 example, Overt Act No. 1 is that in or about September of



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1975 the defendants Boonsak Phuvastikul, also known as "Sammy," and Manop Saiphantong had a conversation in Bangkok, Thailand. Now, obviously there is nothing unlawful about having a conversation in Bangkok, Thailand or anywhere else, unless that conversation is in furtherance of the objects of the conspiracy.

So, even if the acts in and of themselves are innocent, if they were performed by any member of the conspiracy during the existence of the conspiracy and in furtherance of its purpose, then those acts are sufficient to satisfy the third element which the Government must prove.

Now, the Government is not required to prove that all eight overt acts were committed. It is enough if the Government proves beyond a reasonable doubt that at least one of the overt acts was committed in furtherance of the purposes of the conspiracy by any one or more members of the conspiracy. Note that it doesn't have to be the defendant on trial. The overt act performed by any member is sufficient.

Again, you will note that the indictment charges these overt acts as occurring on or about certain dates. The Government does not have to prove those exact dates. It is sufficient if you find that the date

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mentioned in the testimony is within a few weeks of the date alleged.

The same is true as to the place mentioned in the overt acts. There is no requirement that they be exactly those alleged. It is sufficient if they are substantially similar.

Now, consider all of the evidence pertaining to the existence of the conspiracy, the defendant's membership in the conspiracy, and the performance of at least one overt act. If you find that the Government has failed to prove beyond a reasonable doubt all three facts or elements of the crime of conspiracy, as I have defined them, then you must acquit the defendant Wheaton on Count 1.

On the other hand, if you find that the Government has proved beyond a reasonable doubt all three of those facts or elements, then you should convict the defendant Wheaton on Count 1.

Now, in order to convict the defendant Wheaton on Count 4, the Government must prove to your satisfaction beyond a reasonable doubt each of the following elements:

1. That on or about the dates specified in the count the defendant Wheaton imported and caused to be imported, that is, smuggled, into the customs territory



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of the United States -- and here that means the City of New York -- a narcotic drug controlled substance -- here that means heroin. As to this element, "import" means the bringing in or introduction of any article into the customs territory of the United States. As I said, "customs territory" here means New York City.

The second element is that the narcotic controlled substance involved was heroin hydrochloride. As to this element, I instruct you as a matter of law that heroin hydrochloride is a narcotic drug controlled substance. The second element is satisfied if you find that the substance in Government's Exhibit 1 is in fact heroin hydrochloride. There you have the stipulation that if the chemist of the Drug Enforcement Agency were called, he would testify that he analyzed the contents of the white powder contained in Government's Exhibit 1 and that his analysis shows that that white powder is 100 percent pure heroin.

The third element is that in importing and causing the heroin to be imported the defendant acted knowingly and wilfully. As to this element, you should consider and apply all of my previous instructions on the subject of what constitutes knowledge, wilfulness, and so when I discussed the conspiracy count.

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In order to convict the defendant on Count 5, the Government must prove to your satisfaction beyond a reasonable doubt each of the following elements:

1. That on or about the dates specified in the count, the defendant either distributed heroin or possessed heroin with an intent to distribute. The first element is satisfied if you find that the defendant either intentionally distributed heroin or knowingly possessed heroin with an intent to distribute it.

The word "distribute" means the actual constructive or attempted transfer of heroin. The word "possession" means either actual physical possession of the heroin or such power or control over the drug that the defendant could move it himself or cause others to move it at his request or direction. This is what is known as constructive possession.

The word "intent" here refers again to the defendant's state of mind. So the term "possess with intent to distribute" means to control a narcotic drug or to have such control over it by using others, with the state of mind or purpose to transfer it to somebody else.

The second element is that the substance which was distributed or possessed with intent to distribute was in fact heroin. This second element is satisfied if



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2 you find, again, that the white powder in Government's  
3 Exhibit 1 is in fact heroin.

4 The third element is that in distributing  
5 heroin in possessing heroin with an intention to  
6 distribute it, the defendant acted knowingly and wilfully.  
7 Here, again, you should consider and apply all that I  
8 have previously told you on this subject of knowledge and  
9 wilfulness.

10 Now, as to Counts 4 and 5, it is not necessary  
11 for the Government to show that Wheaton himself actually  
12 committed the crimes charged in those counts.

13 The law provides that a person who helps or who aids and  
14 abets another to commit a crime is just as guilty of that  
15 crime as if he had committed it directly and personally  
16 himself.

17 Accordingly, you may find the defendant Wheaton  
18 guilty of the crime charged in Counts 4 and 5, if you find  
19 beyond a reasonable doubt that he aided and abetted some  
20 other person in the commission of the crime charged in  
21 the count which you are considering.

22 Here the Government contends that Wheaton  
23 aided and abetted the other defendants named in Counts 4  
24 and 5 in committing the crime charged in each of these  
25 counts.

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Now, before you can convict the defendant Wheaton for aiding and abetting, you must find that the crime charged was committed by another and that the defendant Wheaton consciously associated himself with the criminal venture with the intent that his conduct would help it succeed. You must be convinced beyond a reasonable doubt that he was doing something to aid the crime, the promote the crime, to forward the crime or to help others commit the crime, to help the other person; that he was a conscious, knowing participant in the crime with a stake in its success and not just a mere bystander, spectator or witness to a crime on the scene when it is committed by another.

Consider each of Counts 4 and 5 separately. If you find with respect to the count which you are considering that the Government has failed to prove beyond a reasonable doubt each of the three elements of the crime which I have given to you, or that the defendant Wheaton knowingly aided and abetted another in the commission of the crime charged in the count which you are considering, you should acquit the defendant on that count.

On the other hand, if you find with respect to the count which you are considering that the Government has proved beyond a reasonable doubt all three elements



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the crime which I have given to you, or that the defendant Wheaton knowingly aided and abetted another in the commission of the crime charged in the count which you are considering, you should return a verdict of guilty on that count.

You are instructed that the question of possible punishment of the defendant in the event of a conviction is no concern of yours and it should not enter into or influence your deliberations in any way. The duty of imposing punishment or sentence in the event of a conviction rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence.

Now, when you retire to the jury room, treat each other with consideration and respect, as I know you will. If differences of opinion arise, your discussion should be dignified, calm and intelligent. Your verdict must be based on the evidence and the law; the evidence which was presented in this case as you remember it, and the law as I have given it to you in these instructions.

You are each entitled to your own opinion. No juror should acquiesce in a verdict against his conscientious individual judgment. Nevertheless, I would

1 point out that no one should enter a jury room with such  
2 pride of opinion that he or she would refuse to change  
3 his or her mind, no matter how convincing or how persuasive  
4 or how intelligent the argument of another juror or jurors  
5 is.  
6

7 Discussion and deliberation are part of our  
8 democratic jury process, and you should approach your  
9 task in that spirit. Talk out your differences. Each of  
10 you should, in effect, decide the case for himself or  
11 herself after thoroughly reviewing the evidence and  
12 discussing it with your fellow jurors with a open mind  
13 and with a desire to reach a verdict. If you do that, you  
14 will be acting in the true democratic process of the  
15 American jury system.

16 There are twelve of you on this jury. The  
17 Court will excuse the alternates before you retire for  
18 your deliberations. Any verdict must be the unanimous  
19 verdict of all of you, and it must represent the honest  
20 conclusion of each of you.

21 I submit the case to you with every confidence  
22 that you will fully measure up to the oath which you took  
23 as members of the jury, to decide the issues submitted to  
24 you fairly and impartially and without fear or favor.

25 Now, members of the jury, if you find that the



1 Government has failed to prove the guilt of this  
2 defendant beyond a reasonable doubt, then you should acquit  
3 him. If you find that he has not violated the law, you  
4 should not hesitate to render a verdict of not guilty.  
5 But, on the other hand, if you find that the Government  
6 has proved the guilt of the defendant beyond a reasonable  
7 doubt, you should not hesitate because of sympathy or  
8 any other reason to render a verdict of guilty.  
9

10 Your foreman, Mr. Badillo, will return an oral  
11 verdict in open court on Count 1, guilty or not guilty;  
12 on Count 4, guilty or not guilty; on Count 5, guilty or  
13 not guilty.

14 Now, don't send me any notes about how you  
15 stand or what your verdict is. Just that oral report,  
16 guilty or not guilty on Count 1, guilty or not guilty on  
17 Count 4, guilty or not guilty on Count 5.

18 Are there any exceptions, gentlemen?

19 MR. SOLOMON: None by the defendant.

20 MR. VIRELLA: None, your Honor.

21 THE CLERK: The alternate jurors are excused.

22 Please report to Room 109.

23 (The alternate jurors are excused.)

24 THE CLERK: Will the marshal please come

25 forward?

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(Marshal sworn)

(At 12:38 p.m., the jury retired to commence deliberations.)

MR. SOLOMON: How long would you like us to wait before we may go to lunch?

THE COURT: You don't need to wait. Just be on call around here. They are going to have their lunch in.

MR. SOLOMON: I will eat in the building anyway.

THE COURT: Be around where we can reach you, and this afternoon you can do your work here.

Get the exhibits together and let's send those in right now.

(Recess)

ad charge



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(At 2:30 p.m., a note was received from the jury.)

(In open court; jury not present)

THE COURT: Gentlemen, we have a note from the jury asking for the time, date, place, Wheaton was arrested, and I'm just sending in a written answer:

"March 23, Carson, California, no evidence as to hour. Judge MacMahon."

Is that all right?

MR. SOLOMON: I want to tell the defendant.

THE COURT: All right.

(Pause)

MR. SOLOMON: Correct, your Honor.

(Recess)

(At 2:55 p.m., a note was received from the jury.)

(In open court; jury not present)

THE COURT: You agree to this note, which I am marking Court's Exhibit B?

MR. SOLOMON: Yes, your Honor.

MR. VIRELLA: Yes, your Honor.

THE COURT: We will send it to the jury.

(At 3:05 p.m., a note was received from the jury.)

(In open court; jury present)

THE COURT: I have your note:

"Does membership in a conspiracy make one responsible for all acts of the other members, whether known or unknown?"

I take it you mean whether they know the actor or whether they know what he does. The answer is yes, so long as the act of any member of the conspiracy is in furtherance of the purposes of the conspiracy and while the defendant is still a member of it, he is responsible for the acts of any other member of the conspiracy, even though he is not present, even though he does not know who is doing the act, or even though he doesn't know what is done.

As I told you, every member of a conspiracy is a partner or an agent of every other member, and therefore the act of any member of the conspiracy during its existence in furtherance of the purposes of the conspiracy binds every other member so long as he is still a member of the conspiracy. He is bound by everything that takes place by a conspirator after he becomes a member.

I think that answers your question.



Any exceptions?

MR. VIRELLA: None, your Honor.

MR. SOLOMON: None, your Honor.

THE COURT: You may retire again.

(At 3:10 p.m., the jury retired to continue deliberations.)

(3:15 p.m., in open court, jury present)

THE COURT: Do you stipulate that all twelve jurors are in the box?

MR. SOLOMON: Yes, your Honor.

MR. VIRELLA: Yes, your Honor.

THE COURT: Take the verdict.

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict on each of counts 1, 4 and 5 as to defendant Bruce Wheaton?

THE FOREMAN: Yes.

THE CLERK: What is the verdict as to count 1?

THE FOREMAN: Guilty on the first count.

THE CLERK: What is your verdict as to count 4?

THE FOREMAN: Guilty.

THE CLERK: And what is your verdict as to count 5?

THE FOREMAN: Guilty.

THE CLERK: You say you find the defendant Bruce Wheaton guilty on count 1, guilty on count 4 and

1 rdmch

2 guilty on count 5, and so say you all?

3 (All jurors indicated in the affirmative.)

4 MR. SOLOMON: Would your Honor poll the jury?

5 THE COURT: Yes.

6 (Upon being asked the question, "Is that your  
7 verdict?", all jurors indicated in the affirmative.)

8 (Court's Exhibits Nos. 1, 2, 3 and 4 are marked.)

9 THE COURT: I want to thank you very much for the  
10 careful attention you gave to the case. I never say  
11 what I would have done if I had been on a jury, because,  
12 as I told you, the decision is entirely up to you.

13 I think you should know, however, that Donald  
14 Head was tried last week and the jury found him guilty  
15 on the same counts, and that the other defendants are  
16 somewhere in Bangkok. If they ever come here, I suppose  
17 they will have to face a jury, too.

18 You are excused now until 9:00 o'clock Monday  
19 morning. So you may go about your regular business on  
20 Wednesday, Thursday and Friday. Report back to the jury  
21 room Monday morning at 9:00 o'clock, room 109.

22 Thank you very much.

23 (Jury excused)

24 THE COURT: Mr. Solomon.

25 MR. SOLOMON: Your Honor, may I reserve any

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Wheaton

2 of the presentence investigation, the information in  
3 that, and the evidence before me in this case and my  
4 observation of this defedndant, and the remarks made in  
5 open court by all of you today.

6 What do you have to say for yourself, Mr.  
7 Wheaton, before the Court pronounces sentence?

8 MR. SOLOMON: The Judge distinctly said that  
9 he did not read this letter.

10 THE COURT: He can say anything he wants to say  
11 about it.

12 MR. SOLOMON: All right, your Honor.

13 THE COURT: Say anything you want to say, anything  
14 you think I ought to know in mitigation of sentence.

15 THE DEFENDANT: Excuse me, your Honor.

16 During this time of arrest they didn't find no  
17 money and no marks on my possession. I do not use no  
18 drugs. I never had none in my possession. So I feel  
19 whatever sentence you give me, I'm going to have to do it,  
20 because I was found guilty in court, but I still feel  
21 I'm innocent.

22 That's all I have to say.

23 THE COURT: Well, the jury has found you guilty  
24 beyond a reasonable doubt, on the basis of very convincing  
25 evidence. The Court must accept that.

1  
2           There isn't any question in the Court's mind,  
3 based on the evidence, that your role in this international  
4 conspiracy to deal in enormous quantities of heroin was  
5 a significant and a high one, that you were right in the  
6 middle of it. Whatever sentence I give you in this case  
7 wouldn't begin to mete out the punishment you deserve for  
8 trafficking in narcotics. The lives that you have ruined  
9 and destroyed with this monstrous business can't be atoned  
10 for by any sentence that Congress has provided.

11           For my money, in my view, the sentence is just  
12 too light. If I could give you life imprisonment I  
13 would, but I can't.

14           Accordingly, you are sentenced to the custody of  
15 the Attorney General for a period of 15 years and 3 years  
16 special parole on each of counts 1, 4 and 5. The  
17 sentences are to run concurrently with each other.

18           Are there any open counts with respect to this  
19 defendant?

20           MR. VIRELLA: No, your Honor.

21           THE COURT: It is my duty to warn you that you have  
22 a right to appeal this conviction, but if you wish to  
23 appeal it, you must file a notice of appeal with the  
24 clerk of the court within ten days. If you have no funds  
25 to hire a lawyer, the Court will appoint one free of



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Wheaton

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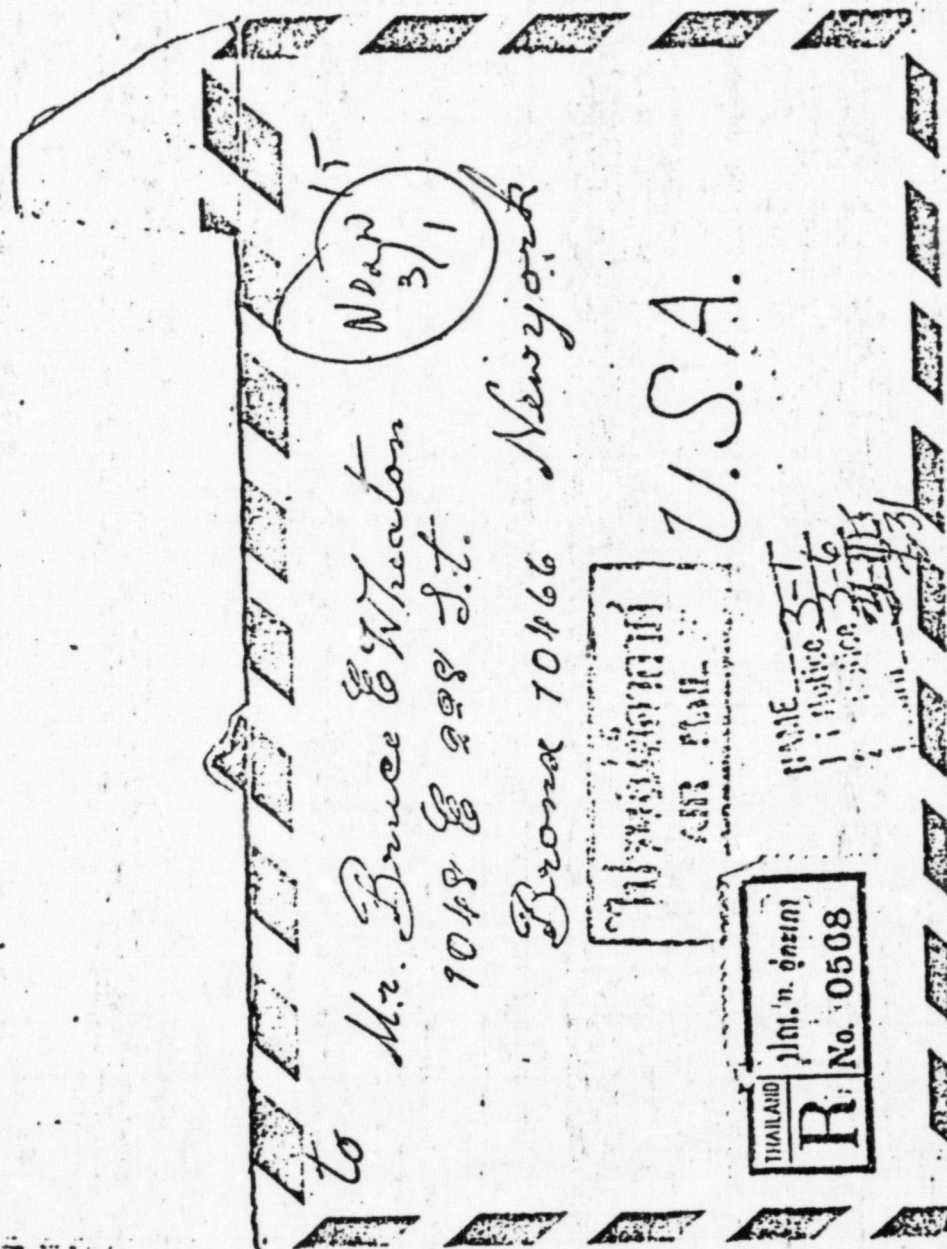
charge.

Do you understand that?

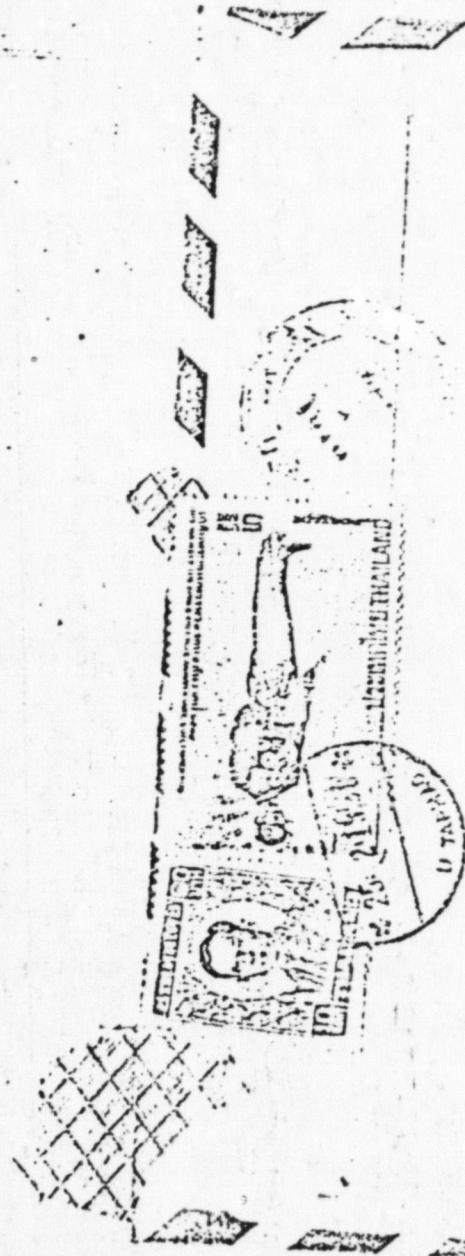
THE DEFENDANT: Yes, I do, your Honor.

THE COURT: That's all.

- - -







From Mr. Boon-tern Telgumnerd  
Rai Termasuk in front of Utao Airpa  
95-6012 20.9.1955 @ Dec 19.1.1956

AP

121  
Tanas

8 March 1976

Bruce my dear friend

I hope this letter finds you in the  
best of health.

(\*) Bruce this time I consign some  
"harp" because my merchant friend  
can't get me that's I want, and my  
brother not believe in it. I think  
time will show them (my brother)

Bruce I hope you will not forget  
me and I remember our last time.

I hope our work will be more on  
the plan as we talk about at hotel.

And hope every thing will be finished  
in this month March. I close now  
hope hear from you soon.

From your friend

Dean Linn



TAYLOR: March 23, 1976 telephone call to Bruce Wheaton at (213) 537-5763; telephone call being made by Boonsak Phuvasitkul. Cl-75-0082.

UNKNOWN  
FEMALE: Hello.

BOONSAK: Hello.

UNKNOWN  
FEMALE: Hello.

BOONSAK: Yes, may I speak to Mr. Bruce Wheaton, please?

UNKNOWN  
FEMALE: Yes, one minute.

WHEATON: Hello.

BOONSAK: Good afternoon, Bruce Wheaton.

WHEATON: Um..

BOONSAK: Are you Bruce?

WHEATON: Um hum.

BOONSAK: Yes, my name is Boonsak.

WHEATON: Um hum.

BOONSAK: Do you remember me?

WHEATON: Boonsak.

BOONSAK: Mr. Boonterm told you about that, about I'm come to New York.

WHEATON: Um hum, how did you get my number?

BOONSAK: Ah - I - before I came here Boonterm gave me your address in Bronx. I went down there, I never see you. They said you went to Bangkok. And I call to Boonterm last night. Boonterm give me this number to get in touch with you.

WHEATON: Yes, what's up?

BOONSAK: Ya. I, I, I need some help from you.

WHEATON: Like what?

BOONSAK: Yes, uh - I got the, the merchandise, two units, you know, they send it from Bangkok. Boonterm send it to me, but I cannot entrust the customer here because I deal this bus, business with him before, but this time they try to cheating me; I have two units in here. I try you to help me. Don, do you know Don, right?

FEV:ik

'25/76

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WHEATON: Um hum.

BOONSAK: Donald Head, yah he send it to me. Can you help me that?

WHEATON: I don't know. I'll have to get back with you man because I not going to be in New York for a while now.

BOONSAK: I see; when will you be coming here?

WHEATON: Um - I don't know right yet. What's your telephone number, man?

BOONSAK: No, no. I'm staying at hotel, I...

WHEATON: Well, what's your hotel?

BOONSAK: Taft Hotel.

WHEATON: Taft?

BOONSAK: Yeah.

WHEATON: Where at? In Manhattan?

BOONSAK: In Manhattan.



WHEATON: Hold on... Taft Hotel?

BOONSAK: Yes, Taft Hotel

WHEATON: Where at, in Manhattan?

BOONSAK: Do you know between 50 and 51st Street?

WHEATON: Yeah, on the West Side, right?

BOONSAK: Yes.

WHEATON: What apartment?

BOONSAK: I beg your pardon?

WHEATON: What apartment, what room number?

BOONSAK: My room number?

WHEATON: Yeah.

BOONSAK: 1107.

WHEATON: What's your name? Boonsak, ah?

BOONSAK: Yeah, my my first name is Boonsak.

WHEATON: And you don't have no telephone number there?  
If, if somebody calls they can, they, you have ah,  
a telephone inside the hallway right?

BOONSAK: You ah, call to the hotel from the operator and they  
have the switch-board to my room.

FEV:1k  
4/25/76  
-12-

WHEATON: Oh, okay.

BOONSAK: Why, ah Bruce why don't when, when you be (-inaudible-) when do you think you can come here?

WHEATON: I told you, right now I don't know.

BOONSAK: Because - uh - if you don't believe me I have the Boonterm ID card along with me. I, I will tell my body how's it look like, okay?

WHEATON: Huh?

BOONSAK: I will tell how's my body look like when you get in here, okay?

WHEATON: Um hum.

BOONSAK: I'm tall, about 5 feet four.

WHEATON: Um hum.

BOONSAK: I wear the glasses, the eyeglass.

WHEATON: Um hum.

BOONSAK: Mustache.

WHEATON: Um hum.



BOONSAK: It, it, it, you know when you come here it very easy to find me because I am, you know, very easy to look at to me.

WHEATON: Yeah, okay.

BOONSAK: I'm, I'm as you know, I, I try to go back very soon, you know, but I don't know how to do this for this two units that Don has send to me, you know.

WHEATON: What time, what time do you work from? What time do you get off from work? Do you go to school? What you do?

BOONSAK: Me?

WHEATON: Yeah.

BOONSAK: I, I just come over for you know for, for business for a couple of days. I want to leave as soon as possible when I finish this. But, I don't know how to do this two units, you know.

WHEATON: Um, okay, uh, what time are you usually home, man?

BOONSAK: I be at the hotel.

WHEATON: Yeah.

FEV:1k  
4/25/76  
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BOONSAK: Ah, you why don't you call me tonight at the hotel?

WHEATON: Yeah, around what time, what's a good time?

BOONSAK: The good time? Is about ah-let me, let me do appointment about? about about 7, 7 o'clock or 6:30 to 7:00 o'clock, how about that?

WHEATON: Yeah, yeah, that's good.

BOONSAK: Okay, you call me at about that time.

WHEATON: Yeah.

BOONSAK: Okay, I be on the phone. Okay, I'll be waiting in my room.

WHEATON: Yeah, okay.

BOONSAK: Okay?

WHEATON: Okay.

BOONSAK: Okay, thank you very much, Bruce...

WHEATON: Hum.



BOONSAK: Please help me, okay, because I don't know anything well, you know. I have two units in here, but I don't know how to do it.

WHEATON: Um.

BOONSAK: And, why not, if you can help me you take this two units then after you selling you send the money to the Boonterm directly, okay.

WHEATON: Um hum.

BOONSAK: It's the best way to do it because I cannot bring the money. Do you have any idea I can bring the money out of this country?

WHEATON: No, unless you could send it to him.

BOONSAK: Yeah, would you please, okay?

WHEATON: Um.

BOONSAK: Ah, I, excuse me Bruce, let me ask you one questions, how, how much do you think you can sell this for him? I can when I go back to Thailand, I can...

WHEATON: I, I don't know, man. I don't know. Don't ask me that question on the phone, man.

BOONSAK: Oh, I see.

WHEATON: Alright, talk to you later.

BOONSAK: Okay, okay, thank you very much.

1 rdmch

2 UNITED STATES OF AMERICA

3 v.

76 Cr. 295

4 BRUCE WHEATON

5  
6 May 11, 1976  
10:00 a.m.

7  
8 (Trial resumed)

9 (In open court; jury present)

10 THE COURT: All right, proceed.

11 MR. VIRELLA: Your Honor, at this time I would  
12 read a stipulation that both parties have entered into.

13 It reads as follows:

14 "It is hereby stipulated and agreed by and  
15 between the United States of America, Robert B. Fiske, Jr.,  
16 United States Attorney for the Southern District of  
17 New York, by Federico E. Virella, Jr., Assistant United  
18 States Attorney, of counsel, and the defendant Bruce  
19 Wheaton, by and with the consent of his attorney,  
20 Abraham Solomon, Esq.:

21 "1. That if called as a witness Edward  
22 Manning would testify he is employed as a forensic chemist  
23 by the Drug Enforcement Administration and is fully qualified  
24 as an expert in the analysis of substances suspected of  
25 being controlled substances and narcotic drugs. While



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2 working at the Drug Enforcement Regional Laboratory he  
3 received Government's Exhibit No. 1A, a sealed brown  
4 package, on February 23, 1976, from Special Agent Andrew  
5 Fenrich of the Drug Enforcement Administration. He  
6 opened Government's Exhibit No. 1A on February 23, 1976  
7 and removed its contents, Government's Exhibit No. 1,  
8 a white crystalline substance which was wrapped by a  
9 towel and a piece of newspaper, Government's Exhibit No. 1B.  
10 After weighing and performing the chemical analyses on  
11 Government's Exhibits Nos. 1 and 1D, he arrived at his  
12 expert opinion that Government's Exhibit Nos. 1 and 1D  
13 contained heroin hydrochloride. They have a net weight  
14 of 638.88 grams and are 100 percent purity of heroin  
15 hydrochloride.

16 "2. That if he were called as a witness,  
17 Tech. Sgt. Dickenson, chief of the Air Force Post Office,  
18 SF96330, would testify that 635 CBSG, Box 6415, APOSF 96330,  
19 is a valid address at the Utapao Air Base in Rayong,  
20 Thailand. He would further testify that Box 6415,  
21 APOSF 96330 has not been used by anyone since the year  
22 1974 to the present.

23 "3. That Government's Exhibits Nos. 64A and  
24 65A, the transcripts of the conversations between Boonsak  
25 Phuvastikul and Manop Saiphantong on March 9, 1976 and

Jamroon Sawanabrooma and Donald Head on March 10, 1976 are accurate English translations of the Thai conversations that appear on Government's Exhibits Nos. 64 and 65, respectively.

"4. That if he were called as a witness, Master Sergeant Thomas C. Dallas, noncommissioned officer in charge of the United States Air Force Worldwide Locator, Air Force Military Personnel Center, Randolph Air Force Base, Texas, would testify that there has not been any individual by the name of Louis Kramer serving with the United States anywhere in the last year from April 1975 to the present.

"5. That during 1976, when Donald Head was stationed in Bangkok, Thailand, with the United States Air Force, he resided at apartment 107 in the Insaf Mansion, Soi 13, Sukhumvit Road, Bangkok, Thailand.

"6. That if called as a witness, Mary A. Baker would testify that she resides at 607A Kuiaaina Way, Kailua, Hawaii, and has never lived at 320 Waia Kamio Road in Lahaina, Hawaii. Moreover, she does not know anyone by the name of Louis Kramer and has not mailed any packages to Louis Kramer in the United States Air Force or in New York City.

"7. If called as a witness, Aki Murakami would



1 rdmch

2 testify that he is a postal inspector with the United  
3 States Postal Service in Honolulu, Hawaii, and that the  
4 return address that appears on Government's Exhibit  
5 No. 1A does not exist in Honolulu or in Lahaina, Hawaii;  
6 additionally, that postal meter Pitney Bowes No. 354309  
7 does not exist anywhere in the islands of Hawaii.

8 "8. That from on or about February 23, 1976  
9 to on or about March 5, 1976, Bruce Wheaton visited  
10 Bangkok, Thailand as indicated in his passport, Government's  
11 Exhibit No. 100, and that during the aforementioned  
12 dates Bruce Wheaton resided at the Chavalit Hotel, 171  
13 Sukhumvit Road, Bangkok, Thailand, as indicated in  
14 Government's Exhibit No. 101.

15 "9. That at the time of his arrest on  
16 March 23, 1976, Bruce Wheaton resided at 968 Donwall  
17 Drive in Carson, California.

18 "10. That if he were called as a witness, an  
19 appropriate official from the California telephone  
20 company would testify that during the month of March  
21 1976, to the present, telephone number assigned to Bruce  
22 Wheaton at 68 Donwall Drive, Carson, California, is  
23 area code 113 217-5763.

24 "11. If he were called as a witness, an  
25 official from the New York State Motor Vehicle Department

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would testify that Bruce Wheaton registered a 1974 green-white two-door Chevrolet automobile under the address of 1048 East 228th Street, Bronx, New York, as indicated in Government's Exhibit No. 102, a New York State Department of Motor Vehicles registration application.

"12. That from on or about January 1972 to on or about January 1973, Bruce Wheaton served with the United States Air Force at Utapao Air Force Base located in Rayong Province in Thailand.

"Dated, New York, New York, May 11, 1976."

My signature and Mr. Solomon's signature and Mr. Wheaton's signature.

THE COURT: So stipulated, Mr. Solomon?

MR. SOLOMON: So stipulated.

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1 witnesses from all over to tell you the (facts) that are  
2 in there. The stipulation is that if these witnesses  
3 were called, this is what they would testify to.  
4

5 MR. VIRELLA: At this time, we would offer  
6 Government's Exhibits Nos. 1 and 1D, 100, 101, 102,  
7 the exhibits the stipulation referred to, as well as the  
8 stipulation, which is Government's Exhibit No. 70.

9 THE COURT: Any objection?

10 MR. SOLOMON: No.

11 THE COURT: Received.

12 (Government's Exhibits Nos. 1, 1D, 100, 101 and  
13 102 were received in evidence.)

14 MR. VIRELLA: At this time the Government  
15 rests, your Honor.

16 THE COURT: Mr. Solomon, I will hear you up  
17 here.

18 (At the side bar)

19 MR. SOLOMON: First, the defendant moves to  
20 strike out all of the testimony given by the witness  
21 Phuvastikul on the ground that the testimony, bearing  
22 in mind the new rules of evidence under the hearsay rule,  
23 bearing in mind that it's all hearsay, nothing has been  
24 confirmed or corroborated by any other witnesses other  
25 than the testimony of that said witness.

xxx

1  
2 THE COURT: Denied.

3 MR. SOLOMON: Secondly, the defendant now moves  
4 for a directed verdict of acquittal and discharge of the  
5 defendant on the ground the Government has failed to estab-  
6 lish facts sufficient to be submitted to the jury to  
7 determine whether or not this defendant was involved in  
8 the conspiracy as charged in the first count of the  
9 indictment, or whether he is involved in the fourth and  
10 fifth counts.

11 THE COURT: The Court denies your motion that  
12 the Government failed to make a prima facie case.

13 MR. SOLOMON: I don't have to take exceptions.

14 The defendant rests.

15 THE COURT: You rest?

16 MR. SOLOMON: Yes, your Honor.

17 THE COURT: Sum up.

18 MR. SOLOMON: You want me to make the  
19 announcement in open court?

20 THE COURT: Yes.

21 (In open court)

22 MR. SOLOMON: At this time the defendant rests.

23 THE COURT: Would you like a few minutes to  
24 gather your thoughts?

25 All right. We will take a very short recess



1 motions I have to make?

2 THE COURT: Could you make it while I have the  
3 facts fresh in mind?

4 MR. SOLOMON: Defendant now moves to set aside  
5 the verdict on the ground that it is contrary to the  
6 evidence, contrary the weight of the evidence, contrary  
7 to the law, contrary to the admission of the testimony,  
8 which I move to strike out, and contrary to the decision  
9 of your Honor to suppress the letter dated March 8th.

10 THE COURT: Motion denied. That's without  
11 prejudice, Mr. Solomon, if you see fit after a more careful  
12 review to make a written motion within ten days.

13 MR. SOLOMON: I know that.

14 THE COURT: What is the bail status?

15 MR. VIRELLA: He is out on bail on a personal  
16 recognizance bond of \$50,000, co-signed by the defendant  
17 and his mother.

18 At this time we would request that that bail be  
19 revoked and that bail be increased to \$100,000 cash or  
20 security.

21 Your Honor, the defendant has been convicted by  
22 a jury of three counts for which he theoretically faces  
23 a term of 45 years in jail. The crime for which he has  
24 been convicted is a most serious crime to the community,  
25